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No. 2284

United States
Circuit Court of Appeals

For the Ninth Circuit.

**TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,**
Plaintiff in Error,

VS.

**A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,**
Defendant in Error.

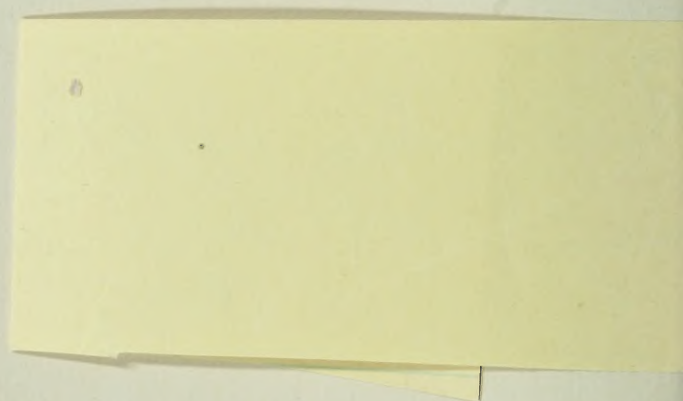
Transcript of Record.

**Upon Writ of Error to the United States District
Court of the District of Nevada.**

FILED

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Records of U. S. Circuit
Court of Appeals
826



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*In the First Judicial District Court of the State of
Nevada, in and for the County of Storey.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Order of Removal.

This cause came on for hearing upon the application of the defendant herewith for an order transmitting said cause to the Circuit Court of the United States, Ninth Circuit, District of Nevada, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that it has filed *this* bond duly conditioned with good and sufficient sureties as provided by law; and it further appearing to the Court that this is a proper cause for removal to said Circuit Court:

Now, therefore, it is hereby ordered and adjudged that this cause be, and the same is hereby removed to the Circuit Court of the United States, Ninth Circuit, District of Nevada, and the Clerk of the above-entitled Court is hereby directed to make up the record in said cause for transmission to said United States Court.

Done in open court this 19th day of November,
1909.

FRANK P. LANGAN,
District Judge.

2 *Truckee River General Electric Company*

[Endorsed]: No. 6550. In the First Judicial District Court of the State of Nevada, in and for Storey County. A. S. Benner, as Admr. of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Order of Removal. Filed this 19th day of Nov., 1909. W. V. Ryan, Clerk. Cheney, Massey and Price, Attorneys for Deft. [1*]

[Summons.]

*In the District Court of the First Judicial District
of the State of Nevada, Storey County.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Action brought in the District Court of the First Judicial District of the State of Nevada, Storey County, and the complaint filed in said County, in the office of the Clerk of said District Court, on the first day of October, A. D. 1909.

The State of Nevada Sends Greeting to Truckee River General Electric Company, a Corporation, Defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff in

*Page-number appearing at foot of page of original certified Record.

the District Court of the First Judicial District of the State of Nevada, Storey County, and answer complaint filed therein within ten days (exclusive of the day of service) after the service on you of this Summons if served in said County, or if served out of said county, but within the District, twenty days; in all other cases forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain Thirty Thousand (\$30,000.00) Dollars damages and costs of suit. For cause of action complainant alleges that he is the administrator of the estate of Clarence J. Benner, deceased, and that you defendant negligently caused a current of electricity to enter the iron cover of the tunnel leading to the Chollar Mine, and that without any neglect on his part you carelessly and negligently allowed and permitted a severe charge and current of electricity to pass through your wires and plant into said iron cover and thence into the body of said Clarence J. Benner, deceased, injuring said Clarence J. Benner, deceased, from which injuries he languished in great pain and [2] agony and subsequently died from said injury received from said current of electricity which you negligently caused to pass from your electric plant into and upon his body, and from the effects he thereafter died.

That the estate of said Clarence J. Benner, deceased, has been damaged in the sum of Thirty Thousand (\$30,000.00) Dollars. And you are hereby notified that if you fail to answer the complaint, the

said plaintiff will take judgment against you for said sum of Thirty Thousand Dollars and costs of suit.

Given under our hands, Storey County, this 1st day of October, in the year of our Lord one thousand nine hundred and nine.

MACK & GREEN,
Attorneys for Plaintiff.

[Endorsed]: In the District Court of the First Judicial District of the State of Nevada, Storey County. A. S. Benner, Administrator of the Estate of Clarence J. Benner, Deceased, versus Truckee River General Electric Company, a Corporation, Defendant. Summons. Filed on Return This 5th day of Oct. A. D. 1909. W. V. Ryan, Clerk. Mack & Green, Attorneys for Plaintiff. No. 1109. U. S. Circuit Court, Dist. Nevada. Filed December 6th, 1909. T. J. Edwards, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Amended Complaint.

Comes now the plaintiff above named, and within the time allowed by law, files this his amended com-

plaint, and for such amended complaint and for cause of action against the defendant avers:

I. That said Clarence J. Benner died intestate at the City of Virginia, County of Storey, State of Nevada, on the 18th day of August, 1909, and at the time of his death was a resident of Storey County, Nevada. [3]

II. That the plaintiff now is, and ever since the 4th day of September, 1909, has been, the duly appointed, qualified and acting administrator of the estate of said Clarence J. Benner, deceased. That Letters of Administration upon the estate of said Clarence J. Benner, deceased, were duly issued to this plaintiff on or about the 4th day of September, 1909, out of and under the seal of the District Court of the First Judicial District of the State of Nevada, Storey County, and thereafter plaintiff duly qualified as such administrator, and said Letters of Administration have never been revoked.

III. That plaintiff is now and at all the times herein mentioned has been a citizen of the United States of America and a resident of the County of Storey, State of Nevada.

IV. That said defendant, the Truckee River General Electric Company, now is and at all the times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, and during all the times in this complaint mentioned, has been a resident and inhabitant of the State of California.

V. That said defendant, the Truckee River General Electric Company, at all the times mentioned

in this amended complaint, and for a long time prior to the date of the death of said Clarence J. Benner, was engaged in the business of generating, producing and distributing electricity and supplying the same for lighting and power purposes at and in the County of Storey, State of Nevada, for sale, hire and profit.

That said corporation defendant, in consideration of a required compensation, to wit, — cents per thousand watts, for all electricity used, was on the day of the death of said Clarence J. Benner, and for more than six months prior thereto, had been engaged in supplying the Charles Butters Company, Limited, a corporation organized under the laws of England, and doing business at the city of Virginia, Storey County, State of Nevada, with electrical current for lighting and power purposes at, in, through and about its certain mine and mining claim in the city of Virginia, County of Storey, State of Nevada, known as the Chollar Mining claim. [4]

That in conducting said business said defendant, Truckee River General Electric Company, during said times made use of a certain electric plant consisting of machinery, wire, poles, conduits, converter boxes, grounding devices, transformers, ground detectors, lamps, incandescent electric light bulbs, sockets, insulators and other appliances for generating, storing and distributing electricity through the city of Virginia, county of Storey, State of Nevada, to and into and through said mine and mining ground and mining claim, worked, controlled

and mined by said Charles Butters Company, Limited.

That at the time of the death of the said Clarence J. Benner and for a long time prior thereto, and at all the times mentioned in this amended complaint, said electric plant, poles, wires, machinery, conduits, converter boxes, transformers, ground detectors, lamps, incandescent electric light bulbs, sockets, insulators, grounding devices, and other appliances for generating, storing and distributing electricity and electric currents thereby generated, stored and transmitted, were and had been under the exclusive control, manipulation and management of defendant, and were and had been during all of said times used by defendant, for the transmission of electricity for light and power purposes throughout the city of Virginia, county of Storey, State of Nevada, to, on, upon, into and throughout the said mining ground and mining claim worked and controlled by said Charles Butters Company, Limited; and for that purpose defendant did at and during the time mentioned, pass over and through said wires to, over, upon and throughout said mining claim, a current of electricity for lighting and power purposes.

That said Clarence J. Benner, at the time of his death, to wit, in the forenoon of the 18th day of August, 1909, and for some hours prior thereto, was actively engaged in the employ of said Charles Butters Company, Limited, and for its benefit in mining and extracting ores from the mining claim worked, controlled and possessed by said Charles

Butters Company, Limited, and for said services said Charles Butters Company, Limited, promised and agreed to pay said Clarence J. Benner as a miner, for his said services, at the rate of four dollars per day.

VI. That at all the times mentioned in this amended complaint, there [5] was an iron covered passageway leading from said mining claim and mining ground so as aforesaid possessed, controlled and worked by the Charles Butters Company, Limited, to a rock-breaker several hundred feet east of the tunnel leading from said mining claim.

That the defendant, the Truckee River General Electric Company, had long prior to the 18th day of August, 1909, constructed and thereafter, and down to and including said 18th day of August, 1909, maintained a pole line carrying high tension wires for the carrying and distribution of electric current, which said pole line leading from the south of said iron covered passageway, in the northerly direction, crossed over and above said passageway, the power lines or high tension wires of which overhung said iron covered passageway at a height of some three or four feet. That the two poles immediately to the south of said iron covered passageway upon which were strung and suspended said high tension wires, were when the same were erected and placed in position, and for a long time thereafter, and up to something like a month before the 18th day of August, 1909, maintained and held in a perpendicular position under the strain of said high tension power wires by a guy wire. That said guy wire at some time during the latter part of the

month of July, 1909, became loosened, or had been broken, and in consequence the two poles, by reason of the strain upon them of said high tension wires, became loosened at the bottom where the same were imbedded in the ground, and, under the strain of the power wires attached to them were drawn and inclined toward the north to such an extent as to cause and allow the slacking of said high tension power wires, thereby allowing the same to fall, and rest upon said iron covered passageway, in consequence of which the iron covering of said passageway was filled and charged with a deadly current of electricity.

That the said defendant wilfully, wantonly, maliciously, carelessly and negligently failed to repair said guy wire and restore said two poles to a perpendicular position, so that the said high tension power wires which they carried should be held suspended above said iron covered passageway; but for the space of a month or thereabouts, prior to the 18th day of August, 1909, including said day, the defendant wilfully, [6] wantonly, maliciously, carelessly and negligently allowed said two poles carrying said high tension wires to remain in such inclined position and carelessly, negligently, wilfully, wantonly and maliciously allowed said high tension power wires to remain in proximity to and rest upon said iron covered passageway. That said Charles Butters Company, Limited, notified the said defendant that said guy wire was broken or loosened and that said two poles were leaning to the north, and that said high tension

power wires were lying or resting upon said iron covered passageway in a manner highly dangerous to those who had occasion to use said passageway, and requested the said defendant to repair said poles and straighten them up and restore them to their proper position so that the high tension wires which they supported might be suspended and held above and clear of said iron covered passageway. That said defendant made an examination of said poles and high tension wires immediately to the south of said iron covered passageway, and having so examined the same promised said Charles Butters Company, Limited, that it would straighten up said poles and restore them to their proper position and repair said broken guy wire that formerly held the said poles and the said high tension power wires in proper position; but notwithstanding said notice the defendant wilfully, wantonly, maliciously and negligently failed and neglected to repair the said equipment and restore the said poles to their proper position and repair the said guy wire; but on the contrary carelessly, negligently, wilfully, wantonly and maliciously allowed said poles to continue to so lean and incline to the north, and said high tension power wires to so remain and rest upon said iron covered passageway and to charge and fill the iron covering of the same with a deadly current of electricity, up to and including the said 18th day of August, 1909.

VI. That said Clarence J. Benner had been in the habit of passing through said iron covered passageway in going to and from his work for said

Charles Butters Company, Limited. That on said 18th day of August, 1909, said Clarence J. Benner came out of said mining claim with others, to eat his luncheon, and without any carelessness or negligence of any kind on his part sat down to eat his luncheon, and leaned his head and shoulders against said iron covering of said passageway, and instantly [7] received into, upon and through his body a severe charge and current of electricity, whereby he, the said Clarence J. Benner, was then and there injured and thereafter languished in great pain and agony, and subsequently died from the effects of said injury. That said defendant then and there carelessly, negligently, wilfully, wantonly and maliciously, and in the manner hereinbefore alleged, caused and permitted said charge and current of electricity from the electric plant of defendant, to enter said iron covering of said passageway and to injure said Clarence J. Benner aforesaid, from the effects of which he thereafter died.

VIII. That said Clarence J. Benner at the time of his death was a strong, healthy, robust young man of the age of nearly nineteen years.

IX. That said Clarence J. Benner at the time of his death was a good and skillful miner and his services then were, and for a long time prior thereto had been, worth the sum of four dollars per day.

X. That said Clarence J. Benner at the time of his death left him surviving A. S. Benner, his father, aged sixty-two years; C. E. Benner, his brother, aged thirty-two years; G. J. Benner, his brother, aged — years; William Benner, his brother, aged

twenty years, and Carrie Bogle, his sister, aged twenty-five years, all residing in the city of Virginia, county of Storey, State of Nevada.

XI. That by reason of the premises, plaintiff, as administrator of the estate of Clarence J. Benner, deceased, has suffered damages in the sum of thirty thousand dollars.

Wherefore, plaintiff demands judgment against defendant for the sum of thirty thousand (\$30,000.00) dollars, and for costs of suit.

MACK & GREEN,
Attorneys for Plaintiff.

State of Nevada,
County of Washoe,—ss.

A. S. Benner, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

A. S. BENNER. [8]

Subscribed and sworn to before me this 25 day of January, A. D. 1910.

[Seal]

C. E. MACK,
Notary Public.

Service of a copy of the foregoing amended complaint admitted this 25 day of Jan., 1910.

CHENEY, MASSEY & PRICE,
Attorneys for Defendant.

[Endorsed]: No. 1109. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Amended Complaint. Filed this 26th day of January, 1910. T. J. Edwards, Clerk. Mack & Green, Attorneys for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Demurrer.

The above-named defendant, without in any manner waiving its right to object to the filing of the amended complaint herein upon the ground that the same was not filed within the time allowed by law or by leave of this Court, hereby demurs to the said amended complaint and for grounds of demurrer states as follows:

I. That said amended complaint is ambiguous and uncertain in that it is alleged in the sixth paragraph or subdivision thereof, "That said guy wire at some time during the latter part of the month of July, 1909, became loosened, or had been broken,

14 *Truckee River General Electric Company*

and in consequence the two poles, etc.," because it is impossible to ascertain from the complaint with any certainty upon what date, if any, the said guy wire became loosened or was broken; and it is impossible to ascertain from the said amended complaint whether the said guy wire became loosened, or whether it was broken; and the said amended complaint contains the alternative allegation.

II. That said amended complaint is uncertain in this,—that it is [9] alleged in said paragraph six of the complaint as follows: "That said Charles Butters Company, Limited, notified the said defendant that said guy wire was broken or loosened and requested the said defendant to repair said poles, etc."—because it is not alleged and it is impossible to ascertain from said amended complaint when the said Charles Butters Company, Limited, notified the defendant, or how it notified the defendant.

III. That said amended complaint is uncertain in this—that it is alleged in the sixth paragraph of said complaint as follows: "That said defendant made an examination of said poles and high tension wires and having so examined the same, promised said Charles Butters Company, Limited, that it would straighten up said poles and restore them to their proper position and repair said broken guy wire, etc."—because it is impossible to ascertain from said amended complaint when it is alleged or claimed that the defendant made an examination of said poles and wires and promised the Charles Butters Company, Limited, that it would straighten up said poles, etc., or who made such examination in

behalf of defendant, or who made the promise alleged.

IV. That said amended complaint is ambiguous and uncertain in this—that it does not appear from said amended complaint how much of the damages alleged to have been sustained by the plaintiff are claimed to have been actual damages, and how much are claimed to be punitive or exemplary damages.

V. That said amended complaint is uncertain and indefinite in that it does not appear therefrom how or in what manner G. E. Benner, G. J. Benner, or William Benner, alleged to be brothers of the deceased, or Carrie Bogle, alleged to be a sister of the deceased, or to what extent they or either of them have been damaged on account of the death of said C. J. Benner.

That it is also uncertain and ambiguous upon the further ground that it does not appear therefrom how or in what manner, or to what extent A. S. Benner alleged to be the father of the deceased has been damaged by the death of said C. J. Benner.

VI. That said amended complaint is uncertain and ambiguous in that it [10] does not appear therefrom whether the damages claimed on account of the death of said C. J. Benner are compensatory or punitive, or to what extent said damages are compensatory, or to what extent punitive.

VII. Upon the ground that the said amended complaint does not state facts sufficient to constitute a cause of action.

Wherefore, the defendant prays the judgment of the Court, that the complaint herein and said

amended complaint be dismissed, for costs of this action, and for such other and further relief as it may be entitled to.

CHENEY, MASSEY & PRICE,
C. L. HARWOOD,

Attorneys for Defendant.

The undersigned attorneys and of counsel for the defendants above named certify that in their opinion the foregoing demurrer is well founded in point of law.

CHENEY, MASSEY & PRICE,
C. L. HARWOOD.

[Endorsed]: No. 1109. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Demurrer. Service of the Within Admitted as of Date of Filing. Mack & Green, Attorneys for Plaintiff. Filed this 3d day of February, 1910. T. J. Edwards, Clerk. Cheney, Massey & Price, C. L. Harwood, Attorneys for Defendant, Reno, Nevada.

Order Overruling Demurrer.

May 14, 1910.

“A. S. BENNER, Admr.

vs.

TRUCKEE RIVER GEN. ELEC. CO.

Now, on this day, came Messrs. Mack & Green, by Mr. Heer, attorneys for plaintiff, and moved the

Court that the demurrer herein be overruled. And it appearing to the Court that Messrs. Cheney, Massey & Price, attorneys for defendant, have been regularly served with written notice that the demurrer would be called up for argument this day, and that they have failed to appear, it is ordered that the said demurrer be, and the same is hereby, overruled, without an examination of the record; and that the defendant have thirty days' time in which to file its answer."

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC COMPANY, a Corporation,
Defendant. [11]

Answer.

Comes now the above-named defendant by its attorneys and answering the amended complaint herein denies, alleges and admits as follows:

I. Admits that at the times mentioned in said amended complaint there was an iron covered passageway leading from said mining claim and mining ground, described in said amended complaint, to a rock-breaker several hundred feet east of the tunnel leading from said mining claim, and in this connection alleges that the siding upon said passageway

was also iron covered, which fact was well known, or ought to have been well known, to the said Clarence J. Benner, deceased; admits that the defendant prior to the 18th day of August, 1909, had constructed and, down to and including said 18th day of August, 1909, had maintained a pole line carrying high tension wires for the distribution of electrical current, which pole line carrying high tension wires passing over said iron covered passageway at about the height of three or four feet; and in this connection this defendant alleges that the said Clarence J. Benner knew, and should have known, of the existence of said high tension lines so maintained by the defendant company as therein alleged, and that the same were constructed and maintained by the defendant for the purpose of furnishing electric current for power and light to the mine in which the said Clarence J. Benner was at the time engaged in working as set out in said amended complaint; defendant denies that in consequence of said guy wire mentioned in said amended complaint becoming broken or loosened in the latter part of July, 1909, to such an extent as to cause or allow said high tension wires to fall or rest upon said iron covered passageway and thereby said iron covering was filled or charged with a deadly current of electricity, but, upon the contrary, this defendant is informed and believes, and upon such information and belief so alleges the fact to be that said wires, by reason of the loosening or breaking of said guy wire, did not fall or rest upon said iron covered passageway until about the 18th day of August, 1909, and that said

iron covered passageway did not become charged with a deadly current of electricity until on or about the 18th day of August, 1909. Defendant denies that it wilfully, wantonly, maliciously, carelessly or negligently failed to repair said guy wire or restore said two poles to a perpendicular position; denies that for the [12] space of a month, or thereabouts, prior to the 18th day of August, 1909, or including said 18th day of August, 1909, this defendant wilfully, wantonly, maliciously, carelessly or negligently allowed said two, or any, poles carrying said, or any, high tension wires to remain in an inclined position, or carelessly, negligently, wilfully, wantonly or maliciously allowed said high tension power wires to remain in proximity to or rest upon said iron covered passageway; admits that said Charles Butters Company, Limited, notified said defendant that said guy wire was broken and loosened, but denies that the said Charles Butters Company, Limited, notified said defendant that said high tension power wires were lying or resting upon said iron covered passageway; and in this connection alleges that said notification was received by the agent of this defendant but a short time prior to the 18th day of August, 1909; denies that this defendant immediately made an examination of said poles or high tension wires to the south of said iron covered passageway, or promised the said Charles Butters Company, Limited, that it would straighten up said poles or repair said broken guy wire; and in this connection it alleges that the examination was made upon the receipt of said notice, and that at the time

said notice was given said high tension wires were not resting upon said iron covered passageway, and that the agent of this company promised as soon as practicable, using all possible diligence therefor, to repair said broken guy wire and straighten up said poles; denies that this defendant wilfully, wantonly, maliciously or negligently failed or neglected to repair said equipment or restore said poles to their proper position, or repair said guy wires; denies that it carelessly, negligently, wilfully, wantonly or maliciously allowed said poles to continue to lean or incline to the north, or said high tension power wires to remain or rest upon said iron covered passageway or to charge or fill the iron covering of the same with a deadly current of electricity up to and including said 18th day of August, 1909, but, on the contrary, in this connection alleges that no deadly current of [13] electricity, as this defendant is informed and believes, got upon said iron covered passageway prior to the 18th day of August, 1909.

II. Answering paragraph VI of said amended complaint defendant denies that on the 18th day of August, 1909, said Clarence J. Benner, deceased, without any carelessness or negligence sat down or leaned his head and shoulders against said iron covering of said passageway at the time he received said deadly charge of electricity, and in this connection this defendant alleges that the said Clarence J. Benner, deceased, at the time knew, or could have known, of the existence of said high tension wires, the position that the same occupied and that said passageway was covered and sided with metal; de-

nies that the defendant on said 18th day of August, 1909, at said place, or at all, carelessly, negligently, wilfully, wantonly or maliciously caused or permitted said charge or current of electricity to enter said iron covering of said passageway or to injure said Clarence J. Benner, deceased.

III. This defendant answering paragraph XI of said amended complaint denies that by reason of the premises therein alleged, or at all said plaintiff, as administrator of the estate of Clarence J. Benner, deceased, or otherwise, has suffered or been damaged in the sum of \$30,000, or in any sum whatsoever, and alleges in this connection that the said A. S. Benner, the father of said deceased, by his acts and conduct had emancipated said deceased, as this defendant is informed and believes, and was not entitled to receive the wages and earnings of said deceased during his minority, and is not entitled under the law to receive any part of any judgment which may be obtained herein as the beneficiary of said Clarence J. Benner, deceased, and therefore has not been damaged in any sum whatsoever; and said defendant upon information and belief further alleges that the said C. E. Benner, brother of said deceased, G. J. Benner, brother of said deceased, William Benner, brother of said deceased, and Carrie Bogle, sister of said deceased, as beneficiaries of said deceased under the law of the State of Nevada, have not been damaged by any act of this defendant in any sum whatsoever.

Wherefore, defendant prays it may be dismissed hence with its costs. [14]

CHENEY, MASSEY & PRICE,
Attorneys for Defendant.

State of Nevada,
County of Washoe,—ss.

Geo. A. Campbell, being duly sworn, upon his oath deposes and says: He is an officer, to wit, manager of said defendant company in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE A. CAMPBELL.

Subscribed and sworn to before me this 1st day of June, 1910.

[Seal]

ROBERT M. PRICE,
Notary Public.

[Endorsed]: No. 1109. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Co., a Corporation, Defendant. Answer. Filed this 2d day of June, 1910. T. J. Edwards, Clerk. Cheney, Massey & Price, Attorneys for Defendant, Reno, Nevada.

Minutes of Court—March 13th, 1911.

A. S. BENNER, as Admr.,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY,

The plaintiff's motion for leave to amend his complaint, and the defendant's motion to strike out certain testimony, heretofore submitted, having been duly considered by the Court, it is now ordered that plaintiff has leave to amend his complaint by filing his two proposed amendments, upon payment of the reasonable expenses of the defendant; and the defendant's motion to strike allowed in part and denied in part. To which rulings counsel for defendant took exception. The defendant then filed its demurrer to the complaint, as thus amended, which was overruled by the Court, and the defendant excepted thereto. The counsel for defendant then filed the answer of defendant to the complaint, as amended, and stated that the defendant had no testimony to offer. * * * [15]

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

**First Amendment to Complaint Proposed to Follow
Paragraph "X."**

That more than four years prior to the death of said deceased, this plaintiff, as the father of said deceased, by his acts and conduct had emancipated the said Clarence J. Benner, and surrendered to him, the said Clarence J. Benner, all his right as a father to the earnings of said Clarence J. Benner.

MACK & GREEN,
Attorneys for Plaintiff.

State of Nevada,
County of Ormsby,—ss.

A. S. Benner, being first duly sworn, on oath says, that as administrator of the estate of Clarence J. Benner, deceased, he is the plaintiff in the above-entitled action; that he has read the foregoing amendment proposed to the complaint on file in said action, and knows the contents thereof, and that the same, and the matters and things therein set forth, are true of his own knowledge, except as to such matters as are therein stated upon information and belief, and as to those matters he believes the same to be true.

A. S. BENNER.

Subscribed and sworn to before me this 13th day of March, A. D. 1911.

T. J. EDWARDS,
Clerk.

[Endorsed]: No. 1109. In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

A. S. Benner, as Administrator, etc., Plaintiff, vs. Truckee River General Electric Company, Defendant. Proposed and Allowed Amendment. Filed March 13, 1911. T. J. Edwards, Clerk. [16]

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

**Second Amendment to Complaint to Follow First
Amendment to Paragraph "X."**

That for a long time prior to the death of said Clarence J. Benner, to wit, for more than one year theretofore, he had contributed large sums of money to the support of his said sister and brothers, to wit, at least the sum of \$50.00 per month, and that if said Clarence J. Benner had lived, he would, after the time of his said death, have continued said contributions.

MACK & GREEN,
Attorneys for Plaintiff.

State of Nevada,
County of Ormsby,—ss.

A. S. Benner, being first duly sworn, on oath says, that as administrator of the estate of Clarence J.

Benner, deceased, he is the plaintiff in the above-entitled action; that he has read the foregoing amendment proposed to the complaint on file in said action, and knows the contents thereof, and that the same, and the matters and things therein set forth, are true of his own knowledge, except as to such matters as are therein stated upon information and belief, and as to those matters he believes the same to be true.

A. S. BENNER.

Subscribed and sworn to before me this 13th day of March, A. D. 1911.

T. J. EDWARDS,
Clerk.

[Endorsed]: No. 1109. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. A. S. Benner, as Administrator, etc., Plaintiff, vs. Truckee River General Electric Co., Defendant. Proposed Amendment. Filed March 13, 1911. T. J. Edwards, Clerk. [17]

*In the Circuit Court of the United States, Ninth
Circuit, District of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

**Demurrer [to Complaint as Amended by Two
Separate Amendments].**

Comes now the above-named defendant by its attorneys, and demurs to the complaint herein as amended by the two separate amendments filed and allowed herein after the trial thereof, and for cause of demurrer alleges:

1. That said amended complaint does not state facts sufficient to constitute a cause of action against this defendant. 2. That said amended complaint as changed and amended by said two amendments does not state facts sufficient, showing that the said A. S. Benner, as father of said deceased, emancipated the said Clarence J. Benner, deceased. 3. That said amended complaint as changed and amended by said two amendments, does not state facts sufficient to show that the brothers and sister, or any brothers or sisters, were dependent upon, or that said brothers and sister, or either thereof, ever had any reasonable expectation of receiving aid or assistance from said deceased; or that said brothers and sister, or either thereof, would ever inherit any property or estate from said deceased; or whether or not said deceased would ever accumulate or save any estate or property which could be inherited by said brothers and sister, or either of them. And for the further reason that said amended complaint, as amended in this respect states mere conclusion of the pleader, and no fact upon which the jury could determine that the death of said Clarence J. Benner had resulted in pecuniary injury or loss to

said brothers and sister, or to either of them. 4. That said amended complaint as changed by said two amendments as allowed, does not state facts sufficient in this, that it does not appear therefrom that any agreement, express or implied, was ever made or entered into between the said Clarence J. Benner, deceased, and A. S. Benner, his father, by or under which the [18] said A. S. Benner emancipated the said Clarence J. Benner, minor, deceased, or surrendered to him, the said Clarence J. Benner, his right as a father to the earnings of the said Clarence J. Benner, deceased.

CHENEY, DOWNER, PRICE & HAWKINS,

W. A. MASSEY,

Attorneys for Defendant.

The undersigned, of counsel, do hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

W. A. MASSEY,

PRINCE A. HAWKINS,

Of Counsel.

[Endorsed]: No. 1109. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. A. S. Benner, as Administrator, etc., Plaintiff, vs. Truckee River General Electric Company, Defendant. Demurrer. Filed March 13th, 1911. T. J. Edwards, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Amendment to Answer.

Comes now the above-named defendant by its attorneys, and by leave of the court first had and obtained, files this its amendment to the original Answer to the Amended Complaint, as amended by two proposed amendments thereto, heretofore allowed by the Court, and therefore amends paragraph three of said amended answer as follows:

This defendant answering paragraph 11 of said amended complaint, denies that by reason of the premises therein alleged, or otherwise or at all, said plaintiff, as administrator of the estate of Clarence J. Benner, Deceased, or otherwise, has suffered or been damaged in the sum of Thirty Thousand Dollars (\$30,000.00), or in any sum whatsoever; that this defendant is informed and believes, and upon such information and belief [19] denies, that for more than four years prior to the death of said deceased, or at all, said plaintiff, as the father of said deceased, by his acts or conduct had emancipated the said Clarence J. Benner, or surrendered to him, the said

Clarence J. Benner, all or any of his rights as a father to the earnings of the said Clarence J. Benner; that upon such information and belief, this defendant denies that for a long time prior to the death of said Clarence J. Benner, or at all, or for more than one year before that time, the said Clarence J. Benner had contributed large or any sums of money to the support of his sister or brothers, or either; and denies that if the said Clarence J. Benner had lived he would after the time of his death, or at all, have continued said contributions. And this defendant in this connection alleges that said A. S. Benner, father of said deceased, is not entitled to receive any part of the proceeds of any judgment which may be obtained herein as a beneficiary of the said Clarence J. Benner, deceased, and therefore has not been damaged in any sum whatsoever. That said defendant upon information and belief further alleges that said C. E. Benner, brother of said deceased, J. G. Benner, brother of said deceased, William Benner, brother of said deceased, and Carrie Bogle, sister of said deceased, as beneficiaries of said deceased, have not been damaged in any sum whatsoever by any act of this defendant.

CHENEY, DOWNER, PRICE & HAWKINS,

W. A. MASSEY,

Attorneys for Defendant.

State of Nevada,
County of Ormsby,—ss.

George A. Campbell, being duly sworn, upon his oath deposes and says, that he is an officer, to wit,

manager of Truckee River General Electric Company, the defendant named in the above-entitled action; that he has heard read the foregoing amendment to the answer, and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE A. CAMPBELL.

Subscribed and sworn to before me this 13th day of March, A. D. 1911.

T. J. EDWARDS,
Clerk. [20]

[Endorsed]: No. 1109. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. A. S. Benner, as Administrator, etc., Plaintiff, vs. Truckee River General Electric Company, Defendant. Amendment to Answer. Filed March 13th, 1911. T. J. Edwards, Clerk.

[Verdict.]

*In the District Court of the United States for the
District of Nevada.*

No. 1109.

A. S. BENNER, as Administrator, etc.,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,

32 *Truckee River General Electric Company*

We, the jury in the above-entitled case, find for the plaintiff, and assess the damages in the sum of \$7,000.00.

Dated April 18th, 1912.

P. S. GREELEY,
Foreman.

[Endorsed]: No. 1109. U. S. District Court, Dist. Nevada. A. S. Benner, as Admr., v. Truckee River General Electric Company. Verdict. Filed April 18, 1912. T. J. Edwards, Clerk.

*In the District Court of the United States, District
of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Judgment.

This action came on regularly for trial, the said parties appearing and being represented by their attorneys, Geo. S. Brown and A. A. Heer and Gray Mashburn, of counsel for plaintiff, and W. A. Massey and Prince A. Hawkins, for defendant. A jury of twelve persons was regularly impaneled and sworn to try the action. Witnesses upon the part of the plaintiff were sworn and examined and documentary evidence introduced. After hearing the

evidence, the arguments of counsel and the instructions of the Court, the jury retired to consider their verdict, and subsequently returned into court with a verdict signed by the foreman, and, being called, answer to their names and say: "We, the jury, in the above-entitled case, find for the plaintiff, and assess [21] the damages in the sum of \$7,000.00."

Wherefore, by reason of the law and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff have and recover of and from the said defendant the sum of seven thousand dollars, with interest thereon at the rate of seven per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action amounting to the sum of ————.

Dated this 19th day of April, 1912.

Attest: T. J. EDWARDS,

Clerk.

[Endorsed]: No. 1109. U. S. District Court, District of Nevada. A. S. Benner, as Administrator, etc., vs. Truckee River General Electric Company. Judgment. Filed April 19th, 1912. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

*In the District Court of the United States, in and for
the District of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

**Order [Staying Execution upon Judgment, and
Retaining Jurisdiction Beyond February Term,
etc.]**

Upon application of the above-named defendant, Truckee River General Electric Company, a corporation, and good cause appearing therefor, execution upon the judgment, entered herein on the 18th day of April, A. D. 1912, is hereby stayed for a period of 42 days from the date of the entry of the judgment herein, upon said defendant filing herein, and within 15 days from the date of the entry of the judgment herein, a bond, subject to the approval of the Court, properly conditioned with two sufficient sureties in the penal sum of \$10,000.00, in order to give said defendant time to file, in the clerk's office of this court, a petition for a new trial.

It is further ordered that jurisdiction be, and is, hereby retained of and over said action by said Court over and beyond the February Term, 1912, in order to enable and permit said defendant to file said petition [22] for a new trial.

It is hereby further ordered by the Court that defendant have 30 days from the entry of said judg-

ment herein in which to prepare, serve and file its bill of exceptions in said action, notice of intention to move for a new trial, motion or petition for a new trial, statement on motion for new trial, or to take any other steps for writ of error which it may desire, and that any bill of exceptions, motions, petitions, or statements and other steps or proceedings necessary therefor may be settled, allowed, filed, served and determined after the expiration of the February Term, 1912, of said court, and for that purpose jurisdiction of this action is hereby retained.

Dated this 23d day of April, A. D. 1912.

E. S. FARRINGTON,

District Judge.

[Endorsed:] No. 1109. In the District Court of the United States, for the District of Nevada. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Order. Filed this 23d day of April, 1912. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Defendant.

*In the District Court of the United States in and for
the District of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Bond for Stay of Execution.

KNOW ALL MEN BY THESE PRESENTS: That the Truckee River General Electric Company, a corporation, defendant above named, as principal, and H. G. Humphrey, of Reno, Washoe County, State of Nevada, and A. G. Fletcher, of Reno, Washoe County, State of Nevada, as sureties, are held and firmly bound unto A. S. Benner, as administrator of the estate of Clarence J. Benner, deceased, plaintiff in the above-entitled action, or to his executors or administrators, in the penal sum of \$10,000, for the [23] payment of which well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our successors, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our Seals and dated this 25th day of April, 1912.

The condition of this obligation is such that: Whereas, on the 18th day of April, 1912, said plaintiff obtained the verdict of a jury in said court in the above-entitled action for the sum of \$7,000, against said defendant; and whereas, said Court entered judgment thereon on the 19th day of April, 1912, for the sum of \$7,000, with interest thereon at the rate of 7% from the date thereof until paid, and costs of suit; and, whereas, said defendant desires a stay of the execution of said judgment for the period of 42 days from the time of entry of said judgment to give to said defendant time to file in the Clerk's office of said court a petition for a new trial in said action;

and, whereas, said Court has ordered that the stay of execution, in pursuance of the statute in such cases made and provided, be made for said period of 42 days on the above judgment for the aforesaid purpose:

Now, therefore, the said Truckee River General Electric Company, as principal, and the said H. G. Humphrey and A. G. Fletcher, as sureties aforesaid, in consideration of the premises aforesaid, do hereby promise and undertake to pay the said judgment, interest and costs, and the costs that may accrue at the expiration of the said stay of execution thereof.

TRUCKEE RIVER GENERAL ELECTRIC COMPANY,

By GEO. A. CAMPBELL,

Its Manager.

H. G. HUMPHREY,

A. G. FLETCHER.

State of Nevada,
County of Washoe,—ss.

H. G. Humphrey and A. G. Fletcher, being duly sworn, upon their oaths depose and say, each for himself and not one for the other, that he is one of the sureties named on the foregoing bond; that he is worth the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities exclusive of property exempt from execution.

H. G. HUMPHREY.

A. G. FLETCHER. [24]

Subscribed and sworn to before me this 25th day of April, 1912.

[Seal]

J. W. DAVEY,
Notary Public.

[Endorsed:] No. 1109. In the District Court of the United States for the District of Nevada. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Bond for Stay of Execution. Filed this 27th day of April, 1912. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Defendant.

In the District Court of the United States, in and for the District of Nevada.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Order Staying Execution.

The defendant above named having filed this day its bond, for the stay of execution in the penal sum of \$10,000, with H. G. Humphrey and A. G. Fletcher as sureties thereon, and said bond having been this day approved by the Court, it is, therefore, ordered that execution of said judgment be stayed for the

period of 42 days from the date of the entry thereof, in order to give to said defendant time to file in the Clerk's office of this Court a petition for a new trial in said action.

Dated this 27th day of April, A. D. 1912.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 1109. In the District Court of the United States for the District of Nevada. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Order Staying Execution. Filed this 27th day of April, 1912. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Defendant. [25]

*In the District Court of the United States, for the
District of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

**Stipulation for Extension of Time to File and Serve
Bill of Exceptions.**

It is hereby stipulated and agreed by and between the respective attorneys of record for plaintiff and defendant in the above-entitled action, that defend-

ant may have additional time, to and including May 27, 1912, in which to prepare, file and serve its Bill of Exceptions in the above-entitled action, and that an order of court may be entered herein in accordance with this stipulation, extending and giving to defendant additional time, and to and including Monday, May 27, 1912, in which to prepare, serve and file its Bill of Exceptions in the above-entitled action.

Dated, Reno, Nevada, this the 15th day of May, 1912.

MACK, GREEN, BROWN & HEER,

Attorneys for Plaintiff.

CHENEY, DOWNER, PRICE & HAWKINS,

W. A. MASSEY,

Attorneys for Defendant.

[Endorsed]: No. 1109. In the District Court of the United States for the District of Nevada. A. S. Benner, etc., Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Stipulation for Extension of Time to File and Serve Bill of Exceptions. Filed this 16th day of May, 1912. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Defendant.

*In the District Court of the United States, for the
District of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,

Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,

Defendant.

Order Extending Time for Bill of Exceptions.

Upon written stipulation by the respective attorneys of record for the plaintiff and defendant in the above-entitled action, and [26] good cause appearing therefor,—

It is hereby ordered by the Court, that defendant have additional time, and to and including Monday, May 27, 1912, in which to prepare, file and serve its bill of exceptions in said action, Notice of Intention to Move for a New Trial, Motion or Petition for a New Trial, Statement on Motion for a New Trial, or to take any other steps for writ of error, which it may desire.

Dated this 16th day of May, A. D. 1912.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 1109. In the District Court of the United States for the District of Nevada. A. S. Benner, etc., Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Order Extending Time for Bill of Exceptions.

Filed this 17th day of May, 1912. T. J. Edwards,
Clerk. Cheney, Downer, Price & Hawkins, Reno,
Nevada, Attorneys for Defendant.

[Bill of Exceptions.]

*In the District Court of the United States, in and for
the District of Nevada.*

No. 1109.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

BE IT REMEMBERED, that this case came on regularly to be heard in the above-entitled court on Monday, the 15th day of April, 1912, at 10 o'clock A. M. of said day, before Honorable E. S. FARRINGTON, Judge of said court, and a jury, a jury having been duly and regularly selected, impaneled and sworn to try said case;

Messrs. Mack, Green, Brown & Heer and Mr. Gray Mashburn appearing as attorneys for plaintiff; and W. A. Massey and Messrs. Cheney, Downer, Price & Hawkins appearing as attorneys for defendant. Whereupon the following proceedings were had and testimony introduced: [27]

(The pleadings are read to the jury by counsel for the respective parties.)

[Testimony of H. B. Bulmer, for Plaintiff.]

H. B. BULMER, a witness called on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. HEER.

Q. What is your full name, please?

A. Halbert Boswell Bulmer.

Q. Where do you reside? A. Virginia City.

Q. How long have you lived there?

A. Well, about all my life.

Q. What is your business? A. Mining.

Q. Did you know Clarence J. Benner in his lifetime? A. I did.

Q. Did you know of his death at the time of his death? A. I did; yes.

Q. Where were you at the time of his death?

A. Why, I was not far from the place of death.

Q. Where were you employed at that time?

A. I was employed at the Chollar and Potosi Mine.

Q. Do you know where Mr. Benner was employed?

A. He was employed at the same mine.

Q. And where do you say you were at the time of his death?

A. Why, in the immediate vicinity; I don't just remember where.

Q. Did you or did you not on that day go to the place of his death? A. I did; yes.

Q. Do you know how soon after his death?

A. I could not say; I don't know at what time death occurred.

Q. Can you tell us what time of day it was when you went there?

(Testimony of H. B. Bulmer.)

A. If I remember, I think it was around 11 o'clock in the morning. I don't just remember.

Q. Did you see the body of Mr. Benner?

A. I did.

Q. Can you tell us where that body was when you first saw it?

A. I saw the body was in a reclining position, laying against the corrugated iron side of the shed, and laying across the rails of the car-track.

Mr. MASSEY.—If counsel is seeking to prove the death of Clarence J. Benner, that is admitted, and it is admitted that he was killed by a current of electricity on that date, so as to shorten the matter.

Mr. HEER.—I am aware of the admission, Judge Massey, that was not the purpose.

Mr. MASSEY.—Then I object as immaterial, if the Court please, under [28] the issue of this case.

Mr. HEER.—The only purpose is this: This witness prepared a map or sketch of this place according to measurement, and I wish simply to show by him that he knew where the body was, the condition it was in and where it was.

Mr. MASSEY.—I withdraw the objection on that theory of the case.

Mr. HEER.—(Q.) You have mentioned a shed constructed of corrugated iron.

Mr. HEER.—What sort of a shed was that—where was it?

A. Well, it was a shed that was constructed from the mouth of the mine tunnel to the rock-breaker, which is some 300 feet from the mouth of the tunnel.

(Testimony of H. B. Bulmer.)

Q. Mouth of what mine? A. Chollar.

Q. Was that the mine in which Mr. Benner was employed? A. Yes.

Q. What was in that tunnel, if anything?

A. What do you mean? What was in the tunnel?

Q. Yes; was there anything at all that you know of in there, was it merely a passageway or tunnel—I don't mean the tunnel, I mean the shed?

A. Oh, the shed? The shed was composed simply of—the sides was corrugated iron and roofing was corrugated iron.

Q. And within the shed was what?

A. Within the shed were the car-tracks.

Q. Was that shed or was it not used as an entrance to the mine? A. It was; yes.

Q. Do you know anything of any power line at or in the vicinity of that shed at the time of Mr. Benner's death? A. Yes.

Q. How many lines?

A. Why, there was a power line consisting of three wires passing over the shed.

Q. Constituting one power line? A. Yes.

Q. And that passed over the shed? A. Yes.

Q. Did you at that time or upon that day make any measurements of distances? A. I did.

Q. Points about the place of this accident?

A. I did.

Q. Did you afterwards record those measurements? A. I did.

Q. Did you prepare a map therefrom? A. Yes.

Q. I hand you a paper and ask you what it is?

(Testimony of H. B. Bulmer.)

A. Yes, this is the sketch. [29]

Q. Was that made from the measurements you took at the time?

A. This was made from the measurements I took.

Q. And when were those measurements taken with reference to the death of Mr. Benner?

A. They were made sometime after the death, I don't just remember at what time I made them.

Q. Was it on the same day, or after that time?

A. I don't remember that. I made them for the Coroner's inquest, and I don't remember whether that was on that night or the next night. I prepared them, however, for that inquest.

Mr. HEER.—I would like to put the map on the board where it can be seen by both Court and counsel.

The COURT.—Have you any objection?

Mr. MASSEY.—I believe we can save time, if the Court please, by at this time reserving, if I desire, the right to object after they have offered the testimony. I simply reserve any right to object on cross-examination when it is offered in evidence.

The COURT.—Very well.

Mr. HEER.—(Q.) This map, Mr. Bulmer, appears to be a blue-print from a tracing; do you know who made the tracing from which the blue-print was made? A. I made the tracing.

Q. Was that tracing a correct representation of the measurements you took there at the time you made them? A. Same as the blue-print.

Q. Same as the blue-print; that was not quite an

(Testimony of H. B. Bulmer.)

answer to the question. Was the tracing, and is the blue-print a correct representation of the measurements which you made at the time you have mentioned? A. Yes, sir, it is; they both are.

Mr. HEER.—I shall offer, if the Court please, the blue-print in evidence.

Mr. MASSEY.—Before it is admitted, if the Court please, I want to examine the witness, and find out something about the scale, and what the marks are on it.

The COURT.—Very well.

By Mr. MASSEY.—(Q.) Mr. Bulmer, you don't remember the date you made these measurements?

A. Not absolutely; no.

Q. How long after the death of Mr. Benner?

A. Well, it may have been the same day, or the next day. [30]

Q. And who assisted you in making the measurements, Mr. Bulmer?

A. Why, I think the electrician assisted me, if I remember.

Q. Who was he; what was his name?

A. Gerrey.

Q. Electrician for whom?

A. Charles Butters Company.

Q. And what did you use in making measurements?

A. We used a steel tape, and I think we had a pole for measuring the height of the pole, approximately.

Q. Who made the memorandum of the measurements at the time they were made?

(Testimony of H. B. Bulmer.)

A. I did, I made all the memorandum.

Q. You made all the memorandum? A. Yes.

Q. And Mr. Gerrey held one end of the tape?

A. He assisted me, yes; he helped me.

Q. And you held the other? A. Yes.

Q. Now, how long after the measurements were made, Mr. Bulmer, was it before you made the tracing?

A. I started right away on the map, because I had to get it ready for the inquest.

Q. Where is that map or tracing?

A. I don't know what became of it.

Q. When was this blue-print made?

A. I think I made that just before the inquest.

Q. And where has it been since?

A. I don't know.

Q. You don't know where it has been? A. No.

Q. Where did you first see it since the inquest over the body of Mr. Benner?

A. Well, I saw it here in evidence a year ago.

Q. I call your attention to a map here marked "Plaintiff's Exhibit 2," and I will ask you which of these you saw here at the trial a year ago last March.

A. I believe this is the one, if I remember right.

Q. This is the one I am asking about (referring to map on blackboard); when you saw this last before the trial in March, 1911?

A. I probably didn't see that then.

Q. And you don't know where it has been since it was made? A. No, I really don't.

Q. Do you know who made this blue tracing?

(Testimony of H. B. Bulmer.)

A. I know I made those tracings.

Q. This blue-print I am talking about; do you know who made this blue-print? [31]

A. I think I do; yes.

Q. What makes you think you made it?

A. Because it corresponds.

Q. Have you compared it?

A. I have looked at my writing on there.

Q. Where is your writing here?

A. Down in the corner you can see my printing and lettering.

Q. That is not your handwriting, is it, Mr. Bulmer?

A. It is my lettering.

Q. I am not asking about lettering; I am asking if that is the way you sign your name?

A. No, that is printed, or lettered, not printed, lettered.

Q. And you have not seen this since it was made until when? A. Why, probably till now.

Q. Until to-day? A. Probably.

Q. And who handed it to you to-day for the first time? A. The attorney.

Q. Since you came upon the witness-stand?

A. Yes.

Q. Now, Mr. Bulmer, I will ask you to state upon what scale this map or blue-print was made or built?

A. 20 feet to the inch.

Q. And the pole that you speak of, used for the purpose of measuring the height of the poles, I will ask you to state what kind of a pole that was?

A. Why, it was simply a thin strip of wood.

(Testimony of H. B. Bulmer.)

Q. How long was it? A. Probably—

Q. (Intg.) I am not asking you probably, Mr. Bulmer.

A. I don't remember how long it was.

Q. You don't remember how long it was?

A. No, this happened in 1909.

Q. I understand this happened in 1909. Do you know whether these poles then are representations of poles based upon a scale of 20 feet to the inch, in their construction upon this blueprint, or upon the original tracing? A. I drew this on 20 feet to the inch.

Q. On 20 feet to the inch? A. Yes.

Q. And the poles then represented on this blueprint are upon the same scale as the other measurements? A. There is no poles on that.

Mr. MASSEY.—We do not object, if the Court please.

The COURT.—It will be admitted, then.

(Blue-print marked Plaintiff's Exhibit No. 1.)

[32]

Mr. HEER.—(Q.) Mr. Bulmer, at the time you went there, just after Benner's death, did you observe the power line you have described?

A. Just at that time do you mean?

Q. Yes. A. Not at that moment.

Q. How long after that time did you first observe it, if at all? A. About an hour or two, perhaps.

Q. After his death, you mean? A. Yes.

Q. Can you tell us, then, the position of that line where it passed over the shed with reference to the top of the shed?

(Testimony of H. B. Bulmer.)

A. It was resting on the shed, one wire, I believe it was one wire resting on the shed.

Q. At the time you came there? A. Yes.

Q. Was that an insulated wire or not?

A. It was an old type asbestos.

Mr. MASSEY.—I move to strike the answer out as not responsive.

Mr. HEER.—The question can be answered yes or no. A. It was insulated, yes.

Q. It was an insulated wire? Did you observe whether or not the insulation on that wire was broken or intact? A. It was broken.

Q. At what point was it broken with reference to the point where it touched the top of the shed?

A. Where it came in contact.

Q. Mr. Bulmer, how was that wire supported and carried over the shed?

A. Why, the wire was supported on regular poles.

Q. In what direction, speaking by the compass now, did the wire line run? A. North and south.

Q. It ran north and south. Did you observe the poles to the south, or the first pole to the south of the shed at that time? A. I did.

Q. What was the condition of that pole with reference to being upright or otherwise, Mr. Bulmer?

A. It was leaning towards the north.

Q. Did you observe the ground about the bottom of that pole at the time?

A. Just at that time, no, I didn't observe the ground then.

Q. Did you at any time? A. I did later.

(Testimony of H. B. Bulmer.)

Q. How much later?

A. After the poles were righted, I don't remember [33] what time.

Mr. MASSEY.—I want to object as to what the condition of the ground was at the foot of the poles after the poles were righted, as a transaction subsequent to the accident.

The COURT.—Unless the conditions were the same as they were at the time of the accident, it would seem to me that is improper.

Mr. HEER.—The witness has not yet fixed the time when he made the examination. If I find it was subsequent to the accident I shall drop it.

The COURT.—Go on and show by the witness, if it is clear that the conditions were the same you are asking about as they were at the time of the accident, I see no reason why it should not come in.

Mr. MASSEY.—I think I will take an exception, because it appears from the testimony of the witness the conditions were not the same, and it involves transactions and changed conditions after the accident, and after the poles had been righted or worked with, subsequent to the accident.

Mr. HEER.—(Q.) Do you know whether or not it was upon the same day, I mean by that the day of Benner's death? A. I think it was.

Q. You think it was? A. Yes.

Q. Do you know how long after Mr. Benner's death? A. No, I could not say exactly.

Q. Was it upon the afternoon of that day, or evening of that day? A. The afternoon, I believe.

(Testimony of H. B. Bulmer.)

Q. Were you there when the pole was righted?

A. No, not when they were pulled into place, I was not there at that time.

Q. Passing to the second pole south of the shed in this line, did you observe the condition of that pole at the time you went there next after Mr. Benner's death? A. Yes.

Q. What was the condition of that pole with reference to being upright or otherwise?

A. It was leaning to the north.

Q. Did you observe any other wire connected with that pole than the power wire of which you have spoken or the three power wires? A. I did.

Q. Describe that wire?

A. That was the guy-wire, or wire that held the pole, and it was lying loose on the ground. [34]

Q. Was it attached to the pole at that time?

A. It was at the top.

Q. At the top? A. Yes, or near the top.

Q. Was the other end attached anywhere or to anything?

A. Not that I remember, I don't believe it was attached at all.

Q. Have you any definite recollection upon that subject?

A. Well, the wire was lying loose, that is, kind of in a coil, so I didn't go and examine it exactly, but it was not supporting anything, I know that.

Mr. MASSEY.—I move to strike the last answer out, if the Court please, as a conclusion of the witness,

(Testimony of H. B. Bulmer.)

and also as not responsive to any question that was asked.

The COURT.—I will allow the answer to stand.

Mr. MASSEY.—I desire an exception for the reasons stated in the motion.

The COURT.—You may have the exception.

Mr. HEER.—(Q.) Mr. Bulmer, can you see the map on the board from where you stand, and the lines upon it? A. I can, yes.

Q. You can see it clearly?

A. Yes, I can see it quite clearly.

Q. What are the directions of that map?

A. Well, to the right is north.

Q. To the right of the map is north, and this would be south (indicating)? A. Yes.

Q. And this the west? A. Yes, that is the west.

Q. And that the east (indicating)?

A. Yes, sir.

Q. Beginning at the top of the map, just in the middle of the west side of the map, I observe four parallel lines running from outside of the squares drawn on the map to the point marked "Potosi Tunnel," tell the jury what those lines represent?

A. The outside lines, heavy lines, were supposed to represent the tunnel.

Q. Walls of the tunnel? A. Yes.

Q. And the lines inside, also parallel to each other and to the wall, were drawn to represent what?

A. Those were drawn to represent the car-tracks.

Q. Beginning at the point marked "Potosi Tunnel" and running in a northeasterly direction as the

(Testimony of H. B. Bulmer.)

map stands, there are again four parallel lines, the outside parallel line extending beyond the point where the inside lines [35] are divided; tell us what the outside lines from the point marked "Potosi Tunnel" to their end indicate?

A. The outside lines indicate what we call the snowsheds.

Q. Describe to us now the construction of that snowshed.

A. It was simply a frame, a gable frame over which was nailed corrugated iron for roofing and siding.

Q. What was the shape of that shed?

A. Regular gable, triangle shape.

Q. What you would term ordinarily an "A" shaped roof? A. Yes.

Q. And the sides were built how?

A. Just simply vertical sides.

Q. Perpendicular sides?

A. Perpendicular sides.

Q. What was the height of that shed?

A. I think the shed was 9 feet and a half or 9 feet 8.

Q. You are referring now from the bottom to the apex?

A. Yes, from the level of the car-track to the apex.

Q. To the apex of the "A"? Within the line last described there are other parallel lines branch until they become four in number, first starting with two; can you tell us what those lines represent?

A. Well, from the tunnel there was a single car-track, and when it came out into the snowshed we had a double track; we put in a switch and had a

(Testimony of H. B. Bulmer.)

double track, simply for a switch and place for the mule team to pass.

Q. These lines as I understand you, within the exterior lines represent car-tracks?

A. Car-tracks.

Q. Of what were they composed?

A. Simply light "T" rails.

Q. "T" rails made of what?

A. Steel, steel "T" rails.

Q. You say you worked in that property?

A. I did.

Q. What was the way of ingress and egress to or from the property, that tunnel of the Chollar mine?

A. It was through that tunnel there, which is marked "Potosi tunnel."

Q. Through the tunnel? A. Yes.

Q. Was it necessary also to go through the snowshed?

A. It was necessary to go into the snowshed, yes.

Q. To get into the tunnel? A. Yes.

Q. I call your attention to a point upon the map and in the northwesterly line of what you have described as the snowshed marked "Door," and ask [36] you what that represents?

A. That was a door that we had there, it was a waste track running out there; it was used simply at certain times when we wanted to use it for dumping waste, instead of turning ore out.

Q. I will ask you to indicate upon the map the point at which the employees entered the snowshed in going to the tunnel and to the mine beyond?

(Testimony of H. B. Bulmer.)

A. Why, in going to work, you mean?

Q. Yes, in going into and out of the mine?

A. They used the door which was a little west, I don't know whether I have marked it there or not, I don't remember; right here at this point on the map (indicates).

Mr. MASSEY.—That don't indicate anything so far as the record is concerned.

A. Marked "Door" there.

Mr. MASSEY.—I simply suggest, if your Honor please, that the word door on that so-called snowshed appears in four different places.

Mr. HEER.—Beginning at the beginning of the shed, taking for that point the end of the Potosi tunnel, the first point marked "Door" was the door you indicated last? A. Yes.

Q. Passing further along we find another point indicated as "Door," what was that door?

A. Well, they had a waste track running out there also, to the south.

Q. And then passing along again we find a third door, marked "Door."

A. That is the door I speak of, where they had a waste dump out to the north.

Q. In passing to and from the mine which way did the employees go?

A. Well, in going into the mine they generally used that west door.

Q. By that you mean the first door you spoke of, the one nearest to the Potosi tunnel? A. Yes.

Q. And in passing out of the mine how did you go?

(Testimony of H. B. Bulmer.)

A. At lunch time they came out to the far door there.

Q. That is the last door farthest from the Potosi tunnel, is that correct? A. That is correct.

Q. I find this map is divided into two sections, in the upper section I find running north and south three parallel lines marked "Main line"; what do they indicate?

A. Well, that is the power line that ran over the shed, over the snowshed. [37]

Q. And the three lines indicate what?

A. Simply were drawn to indicate the three wires.

Q. Beginning at a point north, I find a point, and only one point marked "Pole," what does that indicate?

A. That represents a power pole which is situated at that point, and from which a line ran out to the rock-breaker for power.

Q. Were the three wires constituting the main line attached to that pole? A. Yes.

Q. Going south from the first pole mentioned, and passing over the snowshed, we come to another point marked "Pole," the first point to the south so marked; what does that indicate?

A. That indicates the first power pole to the south.

Q. Passing still farther south we come to a second point south of the sheds, marked "Pole," what does that indicate?

A. That is the second pole of the main power line poles.

Q. Both poles being the poles you have heretofore

(Testimony of H. B. Bulmer.)

referred to south of the snowsheds?

A. South, yes.

Q. What does the bottom section of this drawing represent? A. That is simply a projection.

Q. A projection of what?

A. At a point where the line crosses the shed.

Q. Of the main power line, as you have designated it, crossed the shed? A. Yes.

Q. I find on here a point designated as "Snowshed," I am referring now to the lower drawing; what does that indicate?

A. That is a section cut through the shed we have been speaking about.

Q. At what point?

A. Right beneath the power line.

Q. And then a line drawn passing over the point marked "Snowshed," what does that indicate?

A. That indicates the power line.

Q. And to what would be the south; I find first an upright solid line, and a nearly upright dotted line beside it, what does that indicate?

A. The upright solid line is drawn to indicate the pole.

Q. And the dotted line what?

A. That is drawn to indicate the position of the pole leaning, just the leaning of the pole. [38]

Q. Passing still farther to the south, I find another upright line with a dotted line beside it, nearly upright, what does that indicate?

A. They indicate the same condition as the other pole.

(Testimony of H. B. Bulmer.)

Q. That is, I understand by that, the solid line represents the pole in an upright position, and the dotted line the pole in a leaning position? A. Yes.

Q. Drawn from the pole last described, and from the top thereof, I find two lines, both being dotted, one of them straight and the other curved, what do they represent?

A. One would represent the taut line, guy-line, and the other would represent the loose guy-line.

Q. Which you have heretofore described?

A. Yes.

(An adjournment is taken at this time until Tuesday, April 16th, 1912, at 10 o'clock A. M.)

Tuesday, April 16th, 1912, 10 A. M.

Mr. HEER.—At this time, if the Court please, I desire to ask for an order of publication of the deposition, I believe there is but one, on the part of the plaintiff in this case.

Mr. MASSEY.—We have no objection.

The COURT.—The order will be entered.

H. B. BULMER, direct examination continued.

Mr. HEER.—(Q.) Mr. Bulmer, for what were the tracks in the shed you have described, used?

A. Used for tramming ore to the rock-breaker.

Q. From where?

A. From the mine, Chollar and Potosi mine.

Q. Is that the mine that is entered by the tunnel described here as the "Potosi Tunnel"?

A. It is, yes.

Q. Where was the rock-breaker with reference to that tunnel and shed?

(Testimony of H. B. Bulmer.)

A. The rock-breaker was in an easterly direction, and about 350 feet from there, about 300 feet from the shed, that is, from the point of accident. [39]

Q. From the shed; from which end of the shed?

A. From the east end of the shed there.

Q. That is, the end that appears to the north side of the map?

A. To the right, about where the power line crosses.

Q. Now, Mr. Bulmer, without reference to the condition or position of the body when you reached there, I would like you to tell us its location with reference to the other objects shown on that map. Can you point it out by some marking you have upon that map?

A. Why, there is a mark there, I have an arrow pointing to where the body lay.

Q. And how is that arrow marked?

A. What do you mean?

Q. What does the word "Body" close to that arrow indicate?

A. That was simply to show where the body of Benner lay.

Q. And the arrow points to where the body was at the time? A. Yes.

Q. Was the body within or without that passageway? A. Within the passageway.

Q. Mr. Bulmer, how long prior to the date of Mr. Benner's death had you been employed in or about that operation?

A. I guess probably a couple of years.

Q. Had you before that day observed the position

(Testimony of H. B. Bulmer.)

of that wire with reference to the top of the shed?

A. Well, no, I never had.

Q. You say when you arrived upon the scene the wire was touching the top of the shed; what, if anything, was done with reference to the wire after you arrived there, and while you were there?

A. Why, the wire was lifted from the shed by the use of long plank.

Q. By whom?

A. Well, I don't just remember who it was that did that; I think it was Woods, the foreman.

Q. Do you know whether or not those poles were afterwards righted? A. They were righted, yes.

Mr. MASSEY.—If the Court please, I move to strike the answer out because it is an occurrence subsequent.

The COURT.—I will allow that answer to be stricken out.

Mr. HEER.—Answer the question yes or no, Mr. Bulmer. A. Yes.

Q. How do you know it? [40]

Mr. MASSEY.—I desire to move to strike that answer out, if your Honor please, because it is an occurrence after the accident, and is therefore incompetent.

The COURT.—It don't seem to me that is admissible. I will allow the motion.

Mr. HEER.—(Q.) Mr. Bulmer, did you on the day of Mr. Benner's death observe the roof of the passageway at the point where the wire crossed over?

A. I did.

(Testimony of H. B. Bulmer.)

Q. Did you see anything done to that portion of the roof on that day or the next day?

Mr. MASSEY.—Now, if your Honor please, if there was anything done to that roof next day, I don't see how it would be competent, either for the purpose of showing negligence on the part of the defendant, or for the purpose of showing the condition of the wire.

Mr. HEER.—It is not intended for that purpose; it is a mere preliminary question.

The COURT.—He can answer that yes or no.

A. Yes.

Mr. HEER.—(Q.) Mr. Bulmer, I show you a piece of corrugated iron, and will ask you if you know what that is?

A. That was the piece we cut out of the roof, that the wire rested upon.

Q. Roof of what?

Mr. MASSEY.—I move to strike out the latter part of the answer on the ground it is not responsive to the question, because at the proper time I desire to interpose an objection to the introduction of the record, and don't want it burdened with a statement of that kind at this time.

The COURT.—That portion of the answer will be stricken out, simply because it is not responsive to the question. That is the only ground on which it is stricken out, for the purpose of making your objection later.

Mr. HEER.—May I ask what portion was stricken out, if the Court please?

(Testimony of H. B. Bulmer.)

The COURT.—Simply that the wire rested on it.

Mr. HEER.—(Q.) What roof do you have reference to? A. The snowshed roof. [41]

Q. The snowshed about which you testified?

A. Yes.

Q. Where in that snowshed with reference to the wire which passed over the snowshed?

A. At a point directly under the power line.

Q. When was that cut out of the roof?

A. I believe the date is on there. August 21st, I believe it is; yes, on the 21st.

Q. By whom was it cut out?

A. I think the sheriff cut it out, or his deputy.

Mr. MASSEY.—I don't want to object. Was Mr. Bulmer present and saw him cut it out?

WITNESS.—I was, yes.

Mr. MASSEY.—I wanted to know that fact, you said you thought the sheriff cut it out.

Mr. HEER.—(Q.) What was the sheriff's name?

A. Hendricks.

Q. Who else was present at that time?

A. Deputy Sheriff Morgan.

Q. Mr. Bulmer, what is the condition of that piece of iron now with reference to its condition at the time it was taken from the shed?

A. Why, it seems to be just the same piece, if that is what you mean.

Q. You have identified it as the same piece; I have asked you as to its condition now with reference to its condition then; is it in the same condition it was when it was cut out, or is it in a different condition?

(Testimony of H. B. Bulmer.)

A. It is the same condition, as far as I know.

Q. I show you what appears to be a brighter streak along the ridge of that, and ask you if that was there at the time it was taken from the shed?

A. It was, yes.

Q. I show you a hole in the ridge, apparently burned through that iron, and ask you if that was there at the time the iron was taken from the roof?

Mr. MASSEY.—I desire to object to the question, because it assumes a fact now in evidence, as a part of the question itself.

The COURT.—I will strike that part of it out, the jury can decide when they look at it themselves, whether it looks as though it were burned or not; just simply “apparently burned.”

Mr. MASSEY.—That is all I object to.

Mr. HEER.—I think the question is complete, your Honor, as it stands. You may answer Mr. Bulmer. A. Yes.

Q. I don't recall whether you have stated the date upon which this was [42] taken from the roof, Mr. Bulmer.

The COURT.—He showed the date; the date is written on the iron itself.

A. The date is written on the paster there.

Mr. HEER.—(Q.) I believe you also testified that you saw the roof of the shed at that point on the day of the accident? A. I did, yes.

Q. I will ask you if this piece of iron, or what the condition of this piece of iron is now with reference to the condition it was in on that day, I have refer-

(Testimony of H. B. Bulmer.)

ence to the day of the accident; I mean aside from its being cut from the balance of the shed.

A. Just the same.

Mr. HEER.—That is all.

Cross-examination.

Mr. MASSEY.—(Q.) Mr. Bulmer, you have been working for the Butters Company for more than two years, or about two years prior to the 18th day of August, 1909?

A. I had been working for them for about four years.

Q. About four years? A. Yes.

Q. And during the entire time that you were working for the company, you were working at the Chollar-Potosi Mine? A. No, sir.

Q. What other places did you work for them?

A. Well, I worked at the plant, at the milling plant.

Q. That is in Six Mile Canyon?

A. Yes, sir. And I also did examination work for them.

Q. Did examination work for them? A. Yes.

Q. In what capacity were you employed by the Butters plant on the 18th day of August, 1909, at the time of this accident?

A. Well, I was doing their engineering work.

Q. What character of engineering work?

A. Well, I did their surveying, mapping, sampling, and all that work.

Q. How long had you been employed in and about the Chollar mine, prior to the 18th of August, 1909?

(Testimony of H. B. Bulmer.)

A. I think a couple of years.

Q. And when, if you know, Mr. Bulmer, was the so-called metallic snowshed constructed from the mouth of the tunnel to the east towards the rock-breaker?

A. I could not specifically state what time.

Q. How long before the 18th of August, the date of the happening of the [43] accident to Mr. Benner?

A. Well, it may have been a year or more, might not have been that long, I could not say.

Q. You could not say? A. No.

Q. How long had the rock-breaker that was situated below the mouth of the snowshed leading to the tunnel been situated there?

A. Why, it was placed there at the time Butters took the lease, that is probably about a year and a half before that time.

Q. Before the accident? A. Yes.

Q. How long had you known of this system of power wires prior to the 18th of August, 1909, the time of the accident, passing northerly and southerly over the iron snowshed?

A. Well, I had seen that line there for years before that time.

Q. Had seen it and knew of its existence for years prior to that time? A. Yes.

Q. And when was the line constructed from the word "Pole," being the extreme north pole shown on your map, marked Exhibit No. 1, leading to the rock-breaker on the dump of the Chollar mine?

(Testimony of H. B. Bulmer.)

A. At the same time the rock-breaker was put in.

Q. And how long had you known of the existence of the lines carrying electricity from that pole to the rock-breaker of the Butters plant?

A. Why, at that same time.

Q. How long before that had you known, during the same period?

A. Well, I don't understand what you mean, Judge.

Q. I will withdraw that question and put it in another form. How long did you know of the existence of the wires which carried the electricity or current from the line passing over the snowshed to the Butters rock-breaker?

A. Well, I didn't absolutely know what power was going through that line.

Q. How long did you know it was going there, and had been there? A. Well, I didn't know, no.

Q. When did you first see that line of distribution there? A. Which line, the rock-breaker line?

Q. Yes, the rock-breaker line. [44]

A. We placed the rock-breaker line there.

Q. Who placed it there?

A. The Butters Company.

Q. And the line leading from the rock-breaker tapped the line of the Truckee River General Electric Company at a point near the pole on the extreme north part of your map? A. Yes, it did.

Q. And you knew that had been in existence there for how many years prior to the 18th of August, 1909?

(Testimony of H. B. Bulmer.)

A. I don't know how many years, might have been 20 or 30.

Q. I will ask you to state if the Butters Company plant was using the rock-breaker during August and July, 1909? A. They were, yes.

Q. Nearly beneath the line leading north and south over the snowshed on the southerly side of the snowshed, you have marked the word "Door," what kind of a door was there immediately beneath that line, how large a door?

A. Why, just an ordinary door, like any ordinary size.

Q. Any ordinary size door? A. Yes.

Q. And for what purpose was that door used in July and August, and prior to that time, in 1909, by the Butters Company or the employees?

A. Well, that door I don't believe was used at all.

Q. Well, what was it there for; did you ever see it used?

A. There was a toilet situated out on the dump, it might have been used for that purpose.

Q. I will ask you to state how many poles are shown on this map south of the snowshed, how many electric light poles? A. Two.

Q. The first, on the extreme south side was how high? A. I don't remember how high it was.

Q. Did you measure it? A. I think we did.

Q. Are you sure of it?

A. I am quite sure of it, yes.

Q. You don't remember how high that pole was, the extreme southerly pole on the map shown here?

(Testimony of H. B. Bulmer.)

A. No, I don't just remember how high it was.

Q. I will ask you to state, Mr. Bulmer, how high the pole nearest the snowshed on the south side thereof was at the time you made these measurements? A. How high it was?

Q. Yes.

A. I don't remember how I placed them on that vertical projection there, 20 some odd feet, I think it was. [45]

Q. You don't remember?

A. Not exactly, no.

Q. I will ask you to state, Mr. Bulmer, how high the pole, if you remember, was the first pole to the extreme northerly side of the snowshed, at the time you arrived there?

A. I don't just remember its exact height.

Q. You don't remember its exact height. I will ask you to state if the contour of the surface immediately beneath the line between the extreme northerly pole and extreme southerly pole shown upon the map, was level or broken? A. It was broken.

Q. Which end of the line was higher, and what part of the line was higher, if any, than the other?

A. Why, the middle pole, the first pole south of the shed was on higher ground.

Q. The first pole south of the shed and the one nearest to the shed on the south?

A. On the south, yes.

Q. Was on higher ground than either the extreme southerly or extreme northerly pole?

A. It was on the old dump, yes.

(Testimony of H. B. Bulmer.)

Q. And there are only three poles shown on this map, on this line running north and south over the snowshed? A. Yes.

Q. Do you know whether, or have you any idea how much higher the ground was upon which that center pole was situated than the extreme northerly and southerly poles?

A. Why that ground, that dump ground there, I think is about 8 or 9 feet higher than the north pole, than the base of the north pole.

Q. I will ask you to state whether or not at the time you made these measurements, the wires extending from the extreme north and southerly poles were practically level, or whether in any part of them the wires were higher above the ground than in other places? A. You mean before the—

Q. At the time you made your measurements?

A. Well, let me hear that question. (The reporter reads the question.)

Q. I will simplify the question. Were the wires practically level at the time you made these measurements, between the two extreme poles shown upon this map?

A. When we made those measurements?

Q. Yes.

A. Yes, I think the line had been straightened up; yes, it had been, I remember that now. [46]

Q. Well, then, the wires were level?

A. They were straightened.

Q. And they were practically level?

A. Probably.

(Testimony of H. B. Bulmer.)

Q. Probably level? A. Yes.

Q. And how far when they were straightened up, when you made the measurement, was the lowest wire above the crest of the snowshed?

A. When the line was straightened, they were about 3 feet.

Q. Now let me ask you, Mr. Bulmer, there were three wires on that line, as I understand it? Is that correct? A. Yes, sir.

Q. How were those wires situated relatively, upon that line?

A. I don't remember that, Judge, whether they were on a level, or whether one was higher than the other.

Q. Assuming that was the pole (illustrating on blackboard), and there is the yard-arm at the top of the pole, I will ask you if one of the wires passed in that direction, and another passed in that direction, and if a third passed in that direction, making a triangle?

A. I think they did, but I could not swear positively; I have not looked at that line since that time.

Q. Well, how were they before that time, you saw them frequently?

A. Well, I didn't examine them closely.

Q. You saw one wire there upon the roof, as I understand it, the day of the accident? A. Yes, sir.

Q. Now, which one of the wires was it that was upon the roof the day of the accident, on the 18th day of August, 1909?

A. I believe it was the west one.

(Testimony of H. B. Bulmer.)

Q. The west wire, and that would be the top of the map? Now, I will ask you to state where the east wire was that was upon the yard-arm, if it was so situated at the time you were on top of the roof?

A. There was no yard-arm on the roof.

Q. There was no yard-arm on those poles?

A. On the roof.

Q. I mean the yard-arm on the pole, I didn't mean the roof.

A. The wires were all right on the poles, they were on their insulators.

Q. I will ask you to state if the east wire was slack, or whether it was taut.

A. Why, I think all the wires at that time were a little slack. [47]

Q. I am not asking you that. I move to strike that answer out. If you will just pay attention to my question, Mr. Bulmer, you will find out I am asking you about a particular wire. I am asking you whether the east wire immediately over the roof on the yard-arm of the pole, leading from the yard-arm of the pole, was taut or slack.

A. I do not remember.

Q. You don't remember? A. No.

Q. Do you know how far above the crest of the roof the east wire was on the 18th day of August, 1909? A. I don't remember.

Q. Do you know whether it was there at all or not on that occasion, Mr. Bulmer?

A. I don't remember.

Q. Now, I will ask you, Mr. Bulmer, what the con-

(Testimony of H. B. Bulmer.)

dition of the highest wire passing from the pole over the crest of that roof was, whether it was taut or slack, directly over the roof, when you were up there on the 18th day of August, 1909? A. Which wire?

Q. The highest wire leading from the pole, the highest of the three wires.

A. Whether it was slack?

Q. Whether it was slack or whether it was taut?

A. It was slack.

Q. And how far above the roof was it on that occasion? A. I don't remember.

Q. Did you see it there at all?

A. I saw the wires there, yes.

Q. And the only wire that you did see, that you have any recollection of as to its position at the present time, was the one that was resting upon the crest of the roof?

A. Yes, that was the one that struck me particularly.

Q. When was it you made these measurements for the survey?

A. I made those either the afternoon, I think it was the afternoon of the same day.

Q. You made your measurements then, upon which this map is based, as you believe now, upon the afternoon of the day upon which Benner met his death?

A. Either that afternoon or the next morning.

Q. Which was it, which is your best recollection?

A. Well, I made some of them, some of the meas-

(Testimony of H. B. Bulmer.)

urements on the afternoon, and then I finished up the next morning.

Q. What time in the afternoon?

A. Why, about 3 or 4 o'clock. [48]

Q. And what time was it, did you testify, that Mr. Benner met his death there? A. About 11.

Q. What time after the death of Mr. Benner was it that you were on the crest of that roof on the 18th of August, 1909?

A. Right after his death.

Q. Right after his death? A. Yes.

Q. When you made the measurements on the afternoon of August 18th, 1909, I will ask you to state what the condition of the three wires was leading between these two poles, as to being taut or slack? A. Right after the death?

Q. At the time you made the measurements in the afternoon of August 18th, 1909?

A. Why, the measurements were made when the wire was—after it was straightened.

Q. And what time was it straightened on August 18th, 1909?

A. I believe it was straightened right after the accident.

Q. And who straightened it right after the accident? A. I could not swear positively.

Q. How long after the accident was it before it was straightened? A. Maybe an hour or two.

Q. Maybe an hour or two? A. Yes.

Q. Mr. Bulmer, I will ask you what the condition of the wires was when you made the measurements

(Testimony of H. B. Bulmer.)

between the two poles to the south of the snowshed on the 18th of August, as to being taut or slack?

A. After they were—

Q. At the time you made the measurements; I am not talking about any other time.

A. They were taut then.

Q. I will ask you what the condition of the wires was to the north of the snowshed, when you were on the crest of the roof? A. On the crest of the roof?

Q. Yes, that day, on the 18th of August, 1909.

A. Do you mean right after the accident?

Q. At the time you were on the crest of the roof.

A. I was on the roof several times.

Q. You were on the roof several times?

A. Yes.

Q. Well, at any one of the times you were on that roof on the 18th of August, tell me what the condition of those wires was, the three wires [49] extending northerly from the snowshed.

A. I have testified one wire was resting on the roof.

Q. Now, where were the other wires?

A. Why, they were right near the roof, I didn't measure how far above, but they were all loose.

Q. They were all loose on that occasion?

A. Partly so; yes.

Q. And you did not measure any wire to ascertain where it was on that occasion when you went up there several times for the very purpose of examining the wires, did you? A. The first time, no.

Q. Well, did you at any time?

A. I did later, after the line was straightened up.

(Testimony of H. B. Bulmer.)

Q. I am speaking about before the line was straightened up, and after the accident happened?

A. No, I didn't measure then.

Q. You never measured anything for the purpose of ascertaining anything at that time? A. No.

Q. And any measurements you made were made subsequent to the time that the lines were straightened up on the 18th of August, 1909?

A. They were made just after they were straightened up.

Q. How far was the yard-arm on the extreme south pole above the surface of the ground?

A. I don't remember that.

Q. You didn't measure that?

A. I don't remember it.

Q. Did you measure it?

A. How far the yard-arm was above the ground?

Q. Yes. A. Yes, we did.

Q. Have you the memorandum upon which you constructed this map, showing the measurements made? A. I had no reason to save it, no.

Q. You have not got it? A. No.

Q. And you don't know what it was at that time?

A. No.

Q. And you have no remembrance now of the distance between the yard-arm and the surface of the ground at the time that measurement was made?

A. We can get it off that projection there.

Q. I will ask you to state, Mr. Bulmer, if on that occasion you measured to ascertain how far the farthest wire was, or topmost wire, above the ground,

(Testimony of H. B. Bulmer.)

on the pole to the extreme south?

A. No, I did not.

Q. Did you measure for the purpose of ascertaining how far above the [50] ground the wires were on the extreme northerly pole, or any one of them at that time? A. We measured the pole, yes.

Q. I am asking if you measured to ascertain how high the wires were above the ground?

A. Well, no.

Q. You did not make that kind of a measurement? Coming now to this map, you have marked here upon the vertical projection, so-called, two dotted lines leading from the top of the pole to the south, a distance of nearly one of the squares marked upon the map, what do those dotted lines show?

A. They were simply put in there to show the guy line.

Q. Now, I will ask you to state when you saw the guy line on the dotted mark, on that day in the position indicated here upon this map?

A. When I saw it?

Q. Yes, when did you see it on the 18th of August, 1909? A. I saw it shortly after the accident.

Q. You saw it shortly after the accident?

A. Yes.

Q. And these measurements, and this map was built upon measurements made after it had been straightened, is that right?

A. The guy line there, that was simply put in to show, it was not measured; that is just put in there to show how the guy line looked, that is all; that was

(Testimony of H. B. Bulmer.)

not put in on measurement.

Q. And there was no measurement made by you and Gerrey at all showing the long dotted line as a representation of the guy line at the time you made this map?

A. No, we didn't make a measurement of the guy line at all.

Q. You didn't make a measurement of the guy line at all? A. No, sir.

Q. I will ask you to state what the length of the guy line was as measured by you at the time the measurement was made for the purpose of making this map?

A. I just testified I didn't measure the guy line.

Q. Didn't measure it at either time? A. No, sir.

Q. In the afternoon when you made these measurements and you found these wires taut, how far were the wires above the crest of the roof?

A. About three feet, I think they were 2 feet 9 inches.

Q. Do you refer to the lower or upper wires, about 3 feet? A. That was the lower wire or wires.

Q. Well, do you know whether there were two wires there in the afternoon, [51] or one?

A. There were three wires.

Q. I mean parallel, on the same plane?

A. Why, I think there were two.

Q. You think there were two?

A. I don't remember; this happened three years ago.

Q. I will ask you how far above the two wires was

(Testimony of H. B. Bulmer.)

the third wire. A. I don't remember.

Q. Did you measure it? A. I may have.

Q. Do you know whether you did or not?

A. I think I did.

Q. You think you did. And I will ask you, Mr. Bulmer, to state how you made the measurement of the pole upright upon the vertical projection of this map, showing the pole vertical, and the dotted lines showing the leaning of the pole, how you made that measurement in the afternoon of August 18th, 1909?

A. Why, the electrician climbed the pole to get the measurement.

Q. The pole was erect at that time, was it not?

A. Yes.

Q. And you could not make any measurement at all for the purpose of ascertaining at that time what the leaning of the pole was?

A. Why, no, we could not, we simply got the impression in the ground, that is all.

Q. And did you measure in the ground to ascertain the depth that the pole was in the ground? A. No.

Q. You made no measurement whatever, except an impression there and that impression was still there after the pole had been straightened up and fixed up, was it?

A. After it had been drawn back into place.

Q. After it had been drawn back into place the hole was open? A. Yes.

Q. No dirt had been thrown in there? A. No.

Q. It was open so you could measure it, is that right? A. Yes.

(Testimony of H. B. Bulmer.)

Q. And you did not measure down into the ground to ascertain the depth that the pole extended into the ground beneath the surface? A. How could you?

Q. It was open, as I understand you, was it not?

A. Simply an impression of six inches. [52]

Q. Do you know whether or not that impression had been made by that pole at the time you were there, before the measurement by somebody in trying to right it up after the accident happened?

A. Well, I don't understand what you mean.

Q. The only measurement you made was the impression in the ground at the surface of the ground where the pole had been straightened up?

A. Yes, sir.

Q. How many times were you on the crest of that building on the day this accident happened?

A. Oh, might have been on there two or three or four times.

Q. Mr. Bulmer, I didn't ask how many times you might have been on, you might have been on there a dozen times; I asked you to state how many times approximately? A. I was on twice anyhow.

Q. You were on there twice anyhow. Who was with you the first time? A. I don't remember.

Q. Who was with you the second time?

A. Let's see, your question was on that same day, was it not?

Q. On that same day. A. I don't remember.

Q. And when were you upon the crest of that building again after the day of the accident?

A. When the crest was cut out for an exhibit.

(Testimony of H. B. Bulmer.)

Q. Did you assist in cutting the crest out?

A. I think I did.

Q. And who else assisted besides yourself?

A. The sheriff and deputy sheriff.

Q. I will ask you to state, Mr. Bulmer, how long the wire rested on the crest of that roof after the accident on the 18th day of August, 1909.

A. I can't testify to that absolutely.

Q. You were a witness in this case before?

A. Yes, sir.

Q. And testified? A. Yes, sir.

Q. Testified to being on the roof. I will ask you to state if upon a former examination as a witness in this case, in response to a question you did not testify that the wire was resting upon the crest of the roof of the snowshed from 2½ to 3 hours after the accident happened?

A. I don't know whether I did or not.

Q. Well, at the present time, Mr. Bulmer, I will ask you if you have any [53] recollection as to whether or not, or how long the wire rested upon the crest of the roof after the accident on the 18th of August, 1909?

A. Well, it may have been that long. You must remember it is three years since this happened.

Q. I understand that, Mr. Bulmer.

A. I have not been rehearsing this.

Q. I am not charging you, that is the farthest thing from my mind in the world, to charge you or any other witness with doing anything of that kind; I am simply testing your knowledge of the facts as you

(Testimony of H. B. Bulmer.)

saw them. Now, have you any recollection how long it did rest there after the accident on the 18th of August, 1909?

A. Well, I think you ask me positively, I cannot swear positively; it may have been two hours, and may have been longer.

Q. Now, Mr. Bulmer, if that was resting there two hours or three hours after the accident, I will ask you to state, if you know, whether the current was turned off of those wires during that period of time?

A. I know it was turned off directly after the accident, I know that.

Q. You know that? A. Yes, sir.

Q. And you know that the wire remained there upon the crest of that roof for two or three hours afterwards? A. I think it did.

Q. You think it did. When did you last see those wires before the 18th of August, 1909?

A. Why, I used to see them every day, but didn't take any notice of them.

Q. You saw the wires every day that you were there at work? A. Yes, sir.

Q. And if there had been anything wrong with the wires, if they had been slack and dropping towards the roof, and you had noticed it, you would likely have remembered it, would you not?

A. Why, yes, I think I would.

Q. You think you would. I will ask you to state how frequently you saw the pole to the extreme southern end of your map before the 18th day of August, 1909?

(Testimony of H. B. Bulmer.)

A. Well, I could see the pole, it was in a kind of hollow, but never used to take much notice of any of them.

Q. You could see the pole every day, couldn't you?

A. If you paid any attention to it you could. [54]

Q. I will ask you to state, Mr. Bulmer, when you first observed in that pole the condition of leaning to the north that you have testified to?

A. Well, I didn't observe it, I didn't take any notice of it till the time of the accident.

Q. You didn't take any notice of it until the 18th of August, 1909, and that was the day upon which the accident happened. Now, I will ask you to state, Mr. Bulmer, how frequently you saw the pole in the ground immediately south, the first pole immediately south of the snowshed, prior to the 18th of August, 1909? A. Just simply from a distance, that is all.

Q. I will ask you to state if at any time, either on the day of the accident, or any time prior thereto, that pole was anything at all out of a perpendicular or vertical position?

A. Why, I didn't notice it till after the accident.

Q. Was it out of a vertical position at that time?

A. Right after the accident it was leaning towards the north.

Q. How much was it leaning towards the north?

A. I didn't measure it.

Q. Did you testify before as to the position of the pole, Mr. Bulmer? A. I think so.

Q. Did you testify on a former examination that the pole was out of a vertical position at all on the

(Testimony of H. B. Bulmer.)

day of the accident? A. I think I did.

Q. And you did not measure that pole to ascertain how much it was out of a vertical position?

A. Just measured the impression after it was righted.

Q. You measured the impression of the pole after it was righted. Now, I will ask you to state what the position of the pole nearest to the snowshed to the north thereof was, as being out of a vertical or in a vertical position on the 18th day of August, 1909?

A. That pole seemed to be vertical.

Q. What kind of guy wires had it, any?

A. It had good taut guy wires, I think in two directions.

Q. What directions?

A. I think it was a wire to the north and one to [55] the west.

Q. One to the north and one to the west?

A. I think; I don't remember that exactly.

Q. And when you went after the accident to the pole, to the extreme south, what was the condition of the guy wire that day immediately after the accident?

A. The guy wire was simply laying loose.

Q. It was broken, was it?

A. I could not say as to that; it was lying loose, that is all I remember.

Q. That may mean one thing and may mean another thing; it was loose how? A. It was not taut.

Q. It was not taut, but was it attached to anything in the ground? A. I don't believe it was.

Q. I ask you what you observed about it, and what

(Testimony of H. B. Bulmer.)

your recollection is.

A. My recollection is that it was not attached to anything.

Q. And when had you seen that guy wire before the 18th day of August, 1909?

A. I hadn't noticed it at all.

Q. You had not noticed it at all. And the guy wire, it was not broken at all, the end of it, one end was attached to the top of the pole, was it not?

A. Yes.

Q. And the other end was you say lying loose on the ground? A. Yes.

Q. And your impression is now it was not attached to anything?

A. To the best of my recollection, it was not.

Q. Did you see any pipe there?

A. No, I did not.

Q. What kind of ground, or what was the situation there as to the ground when you went there?

A. That ground is an old mill-site.

Q. Were there any pipes standing out of the ground there at that time? A. No.

Q. And you never saw any at any other time there, did you? A. Not that I recollect.

Q. Did you see any irons, or anything of that kind, in the ground there, or in the foundation of the mill?

A. Not that I recollect.

Q. What kind of a foundation was it?

A. Why, it was—what, the mill foundation? [56]

Q. Yes.

A. It was not directly near that pole at all.

(Testimony of H. B. Bulmer.)

Q. How near was it?

A. Might have been 100 feet, part of it.

Q. And you didn't see any pipe there?

A. Where?

Q. Where the guy wire was? A. No, I did not.

Q. You saw nothing there?

A. No pipe that I remember.

Q. No pipe that you remember. Who went there with you, Mr. Gerrey? A. Mr. Gerrey.

Q. Did you see the pole straightened on the 18th of August, 1909? A. I did not, no.

Q. You don't remember what hour they were straightened? A. No.

Q. But you do know that it was between 3 and 4 o'clock that you made those measurements?

A. I am quite positive of that, that I made part of the measurements.

Q. What was the distance as measured by you between the pole to the extreme south and the one nearest to the snowshed?

A. It is marked there. It is on the projection, down at the bottom of the map, I think it is.

Q. It is marked 146 feet between those two poles, and from the pole nearest the snowshed to the south, to the snowshed is how many feet? A. It is 90.

Q. And from the snowshed to the pole to the north, is how many feet? A. 51 feet.

Q. Mr. Bulmer, I will ask you to state if on that vertical projection the wires represented on the pole line between the poles immediately adjacent to the snowshed, are truly represented there as you meas-

(Testimony of H. B. Bulmer.)

ured them on that day? A. Yes, they are.

Q. The wires at that point then are as you measured them between those points on the 18th day of August, 1909?

A. Those are as the poles and wires were after they were righted.

Q. After they were righted? A. Yes.

Q. And at that time, Mr. Bulmer, I will ask you to state if the line representing the lower wire crossed the upper wire at a point immediately south of the snowsheds? A. I simply showed one wire.

Q. Well, were there three wires there at that time, or only one wire? [57]

Mr. HEER.—I think you have made a mistake on the map, Judge Massey.

A. There are three.

Mr. MASSEY.—(Q.) What was their relative position at that time over the snowshed, at the time you made the measurement?

A. They were clear of the snowshed.

Q. I am speaking relatively to each other.

A. I don't remember.

Q. Mr. Bulmer, who was this Mr. Gerrey that you speak of as having assisted you in making your measurements?

A. He was the electrician for Charles Butters at the mine.

Q. For the Charles Butters Company, Limited?

A. Yes, sir.

Q. Now, I will ask you, Mr. Bulmer, in going to and coming from work, where did men employed in

(Testimony of H. B. Bulmer.)

the Chollar Mine pass with reference to the wires passing over that shed?

A. All west, that is towards the top of the map there.

Q. And where was Virginia City, the business part and homes of Virginia City, with respect to the Chollar Mine? A. It was north and west.

Q. Virginia City was north and west?

A. Yes, sir.

Q. And the people in coming there passed up to the northeast?

A. No, they would come along north, that is, at the top of the map.

Q. That is, they came along north at the top of the map? A. Yes.

Q. And they entered the—

A. They came along south, I should say.

Q. They came along south?

A. They came from the north to the south.

Q. That is this direction then (indicates)?

A. Yes.

Q. And they entered the snowshed at what point?

A. A point that is marked "Door" to the extreme west there.

Q. I will ask you to state if the ground here was not higher than the ground to the east?

A. Yes, it is.

Q. Considerably higher? A. It is, yes.

Q. There is nothing to obstruct the view from that point of either the wires or the poles?

A. Well, right where the door enters there the

(Testimony of H. B. Bulmer.)

snowshed is about on a level, that is, about level, but the ground above is much higher.

Q. Much higher, so there is no obstruction to see to the east in [58] all directions? A. No.

Q. How many persons were employed in the Chollar Mine on or about the 18th of August, 1909?

A. Well, I don't remember, the foreman can tell you that.

Q. Who was the foreman?

A. Woods, Jim Woods.

Q. Who was the manager or superintendent?

A. S. M. Stone.

Mr. MASSEY.—I believe that is all I desire to ask.

Redirect Examination.

Mr. HEER.—(Q.) I believe Judge Massey's last question was where the men passed into the snowsheds in going to and from the mine, and you said they went in at the door nearest to the west side of the map? A. Yes.

Q. Did they also come out that door?

A. Why, they did at quitting time, but not at lunch time.

Q. Which way did they go out at lunch time?

A. At lunch time they went out to that far door, and sat there in the sun.

Q. What door do you refer to as the far door?

A. The door there near the power line.

Mr. MASSEY.—I think he testified to that was the reason I did not ask him about it.

Mr. HEER.—I am aware of that, Judge Massey. (Q.) The door you refer to is the door where?

(Testimony of H. B. Bulmer.)

A. The door east of the power line. I think it is marked.

Q. Nearest to the power line and east of it?

A. Yes, sir.

Q. You testified that a branch line, apparently running east from the north and south line, supplied power to the rock-breaker? A. Yes.

Q. Is that correct? A. Yes.

Q. What did the main line continuing on north supply power to, if you know?

A. Well, I would not say.

Q. Do you know of anything that it supplied power to? A. Not absolutely.

Q. Were there any other mines beyond that?

A. Well, there is a mine there but it was shut down at that time.

Q. You don't know what? A. No.

Mr. HEER.—That is all. [59]

[Testimony of George P. Geyer, for Plaintiff.]

GEORGE P. GEYER, a witness called on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. HEER.

Q. What is your full name?

A. George P. Geyer.

Q. How old are you? A. 33 years old.

Q. Where do you reside? A. Virginia City.

Q. How long have you resided there?

A. Four years.

Q. What is your business, Mr. Geyer?

A. Miner.

(Testimony of George P. Geyer.)

Q. Did you know Clarence J. Benner in his lifetime? A. Yes, sir.

Q. Did you know of his death at the time of his death? A. Yes, sir.

Q. Where were you at that time?

A. I was with him.

Q. Do you know where Mr. Benner was employed at that time? A. Yes, sir.

Q. Where? A. Chollar Company.

Q. Where were you employed?

A. Same company.

Q. That is the Chollar Mine in Virginia City?

A. Yes, sir.

Q. Describe to the jury, Mr. Geyer, the entrance to the Chollar Mine as it was on the day of Mr. Benner's death.

Q. I would like to ask what you mean by the entrance?

Q. I mean the way of going into and out of the Chollar Mine.

A. Well, there was two entrances, two tunnels.

Q. Two tunnels? A. Yes, sir.

The COURT.—Direct his attention to the particular one you want him to describe.

Mr. HEER.—I will, if your Honor please, I withdraw that question. (Q.) You have stated, I believe, that you were employed at the Chollar Mine, by whom were you employed?

A. By the Butters Company.

Q. What time of day was it when Mr. Benner came to his death?

(Testimony of George P. Geyer.)

Mr. MASSEY.—That is not disputed between us; there is no controversy about that proposition.

The COURT.—Well, he can fix the time if he wishes to.

A. Mr. Benner was killed at about I think either 10:50 or 10:55.

Mr. HEER.—(Q.) How do you fix that time?

A. We used to eat at 11 o'clock, and we came out that day, I guess 10 minutes before time; it takes us pretty nearly five minutes to walk out of the tunnel.

[60]

Q. To walk out of the tunnel? A. Yes.

Q. When you came out of the tunnel where did you go? A. Went into the snowsheds.

Q. Was the snowshed connected with the tunnel?

A. Yes, sir.

Q. Will you describe that snowshed to the jury, please, tell them how it was constructed, and of what?

A. Well, it was constructed—the mouth of the tunnel is constructed with a wood structure, and then—well, I should judge between 50 and 60 feet of wood.

Q. That is measuring from the mouth of the tunnel?

A. Yes; and then it is constructed of corrugated iron from there to the rock-breaker.

Q. From there to the rock-breaker? A. Yes.

Q. Describe the sides and roof of that tunnel. What kind of a roof was it?

A. Well, a corrugated iron roof.

(Testimony of George P. Geyer.)

Q. What was the shape of the roof?

A. Well, the ordinary roof.

Q. Did it slant one way or two ways?

A. No, it slanted two ways.

Q. It was an "A" shape roof?

A. "A" shape.

Q. And the sides you say were of corrugated iron also? A. Yes, sir.

Q. Were they or were they not connected with the roof?

A. They was connected with the roof, yes, sir.

Q. What was within the snowshed, inside of the snowshed?

A. Just the track running through, the car-track.

Q. What kind of track? A. Steel track.

Q. From where to where did that track run?

A. From the chutes in the mine to the rock-breaker.

Q. What was it used for?

A. For transporting ores from the chutes to the rock-breaker.

Q. From the chutes, what do you mean by the chutes? A. Ore-chutes.

Q. Inside of the mine? A. Yes, sir.

Q. Do you know of an electric power wire that passed over that shed? A. Yes, sir.

Q. How many of them?

A. I know of just the one.

Q. One wire or one line?

A. Three wires, three-phase.

Q. Constituting one line? A. Yes, sir. [61]

(Testimony of George P. Geyer.)

Q. Did you observe that line or those wires before the day of Mr. Benner's death? A. I did not.

Q. Upon the date of his death? A. I did.

Q. Before or after his death? A. After.

Q. How long after his death?

A. I should judge about five minutes.

Q. Did you observe the wire where it passed over the snowshed at that time? A. I did.

Q. What was the position of the wire, or any or all of the wires with reference to the top of the snowshed at that time?

A. There was one wire touching the snowshed.

Q. Can you say which wire it was?

A. It was the west wire.

Q. How was that wire supported in carrying it over the snowsheds? A. By poles.

Q. Did you examine the pole, or any of the poles supporting that wire at that time? A. No, sir.

Q. Did you examine them after that time?

A. No, I did not.

Q. Not at any time? A. No.

Q. You made no examination of the poles?

A. No, I did not.

Q. Mr. Geyer, had you ever observed that wire before the time of Mr. Benner's death?

A. I did not.

Q. How long have you been employed in that mine, Mr. Geyer?

A. About a little over two years, I believe.

Q. Prior to the death of Mr. Benner? A. Yes.

Q. In going into and coming out of that mine what

(Testimony of George P. Geyer.)

way did the men follow?

A. Well, they always generally followed in single file.

Q. That is not what I mean; how did they get in and how did they get out?

A. Some miners went in generally in the upper tunnel, and the chute-men and the mule-train men went in the lower tunnel; and also some miners that worked on that same level went in that way too.

Q. Have you seen the map, Mr. Geyer, which is upon the board before you?

A. I did not, no, sir.

Q. Have you ever seen that map? A. No, sir.

Q. With which tunnel is the snowshed connected?

[62] A. The lower tunnel.

Q. How did the men working in the lower tunnel get into the mine, where did they go into it?

A. Well, went into the mouth of the lower tunnel.

Q. Came out of the lower tunnel?

A. Went into the lower tunnel.

Q. Is the snowshed connected directly with the lower tunnel? A. Yes.

Q. Where did they go from there?

A. When they left there went to the change-room.

Q. And how did they get to the change-room?

A. Had to go up over the hill, I don't know what street they call it, there where the works are, black-smith-shop and assay office and change-room.

Q. At what point did they enter the snowshed in going to work?

A. It would be on the south point.

(Testimony of George P. Geyer.)

Q. At the southerly end of the snowshed?

A. Of the snowshed, there is an entrance there, must be 25 or 30 feet from the end of that tunnel.

Q. That is the southerly end?

A. Yes, sir, the south end of the tunnel.

Q. What direction do the snowsheds run?

A. East and west.

Q. Directly east and west? A. Yes, sir.

Q. That is your recollection? A. Yes, sir.

Q. How did they leave the mine?

A. Leave the same way.

Q. Do you know where the men ate their lunch generally there? A. Yes, sir.

Q. Where? A. In the snowsheds.

Q. In the snowsheds? A. Yes, sir.

Q. Where, in what part of the snowsheds, corrugated iron or wooden part?

A. In the corrugated iron part.

Mr. HEER.—That is all.

Cross-examination.

Mr. MASSEY.—(Q.) Generally the men ate their lunches or dinner, as it might be, in the corrugated iron snowsheds? A. Not all of the men, no, sir.

Q. Well, where else did part of them eat?

A. In the mine. [63]

Q. Those were the men that were working in the stopes, were they not? A. Yes, sir.

Q. But the men that were running the cars or operating, you speak about mules, such as that, trackmen and muckers, they came out into the snowshed, is that right?

(Testimony of George P. Geyer.)

A. Just the chute-men, that is all that came out.

Q. And they didn't eat at any other place except in the snowsheds? A. That is all.

Q. You speak of two tunnels, the upper and lower tunnel? A. Yes, sir.

Q. Which one of the tunnels was it that the snowsheds covered? A. The lower tunnel.

Q. How far above the lower tunnel was the upper tunnel?

A. Well, as near as I could think, I should not think it would be more than 25 feet.

Q. About 25 feet? A. Yes, sir.

Q. And the men who went into the upper tunnel through the snowsheds were employed how, what was their employment?

A. Working on the chutes.

Q. And the men who went into the upper tunnel were the men engaged how? A. Mining.

Q. Now, Mr. Geyer, I will ask you to state how long it was that you were working there before the 18th of August, 1909, before this accident?

A. How long I was working there?

Q. Yes.

A. Pretty near a year, I believe, somewhere around there.

Q. Constantly? A. Yes, sir.

Q. And in what capacity?

A. Why, I had charge of the chutes there.

Q. You had charge of the chutes? A. Yes.

Q. And you took your lunch or dinner in the snowsheds? A. Yes.

(Testimony of George P. Geyer.)

Q. What was Benner doing at that time, do you remember? A. Yes, sir, he was running a car.

Q. How long had he been running a car?

A. Well, he was running a car there probably, off and on, he had been working pretty near the whole year running a car.

Q. And he usually took his lunch at the same place you took yours, in the snowsheds?

A. Yes, sir, he always ate with me.

Q. Under the corrugated covering of the snowsheds? A. Yes, sir. [64]

Q. Mr. Geyer, you state that on the day of the accident, the 18th of August, 1909, you saw these wires over the snowsheds after the accident?

A. I did.

Q. How long after the accident?

A. About five minutes.

Q. And what was the condition now of the three wires constituting the line passing over this snowshed? A. One was touching the roof.

Q. That is the west wire? A. Yes.

Q. And that was the wire nearest to the tunnel above? A. Yes, sir.

Q. And there was another wire parallel with it on the same yard-arm, wasn't there?

A. Right above it, yes.

Q. No, right on the same yard-arm.

A. Well, I could not state that.

Q. Well, did you see it?

A. I seen the three wires, yes.

Q. I will ask you to state, calling your attention

(Testimony of George P. Geyer.)

to this rough draft here, I am not an artist, if there were not two wires one opposite the other, on the yard-arm? A. And one on top.

Q. And one on top? A. Yes, sir.

Q. Now it was the lower west wire that was resting upon the roof, is that right?

A. Yes, sir, I think it was.

Q. And where was the lower east wire when you were on top of that building?

A. It was not touching the building.

Q. Did you see it? A. Yes, sir.

Q. How far above the building was it?

A. Well, between 2 and 3 feet.

Q. Now the top wire, Mr. Geyer, how far was that above the building, the one that passed the single wire above the two lower wires?

A. Probably that was 6 inches higher.

Q. Possibly 6 inches higher?

A. I believe so.

Q. I will ask you to state if you ever noticed the top of the poles, to know whether or not the height of the top wire did not pass about 18 inches above the yard-arm carrying the lower wire, if you ever noticed that? A. I did not.

Q. You don't know? A. No.

Mr. MASSEY.—That is all. [65]

[Testimony of James G. Wood, for Plaintiff.]

JAMES G. WOOD, a witness called on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. HEER.

Q. State your name in full.

(Testimony of James G. Wood.)

A. James Gordon Wood.

Q. Where do you reside? A. Virginia City.

Q. How long have you resided there?

A. Ever since about '46.

Q. What is your business?

A. Carpentering foreman.

Q. Did you know Clarence J. Benner in his lifetime? A. I did.

Q. Did you know of his death at the time of his death? A. I did.

Q. Where were you employed at the time of his death? A. Foreman of the Chollar Mine.

Q. By whom were you employed?

A. Charles Butters Company.

Q. Do you know where Mr. Benner was employed? A. At the mine.

Q. Were you at the mine on the day of Mr. Benner's death? A. I was.

Q. Mr. Wood, do you know of the snowshed that is connected with the lower tunnel of the Chollar Mine? A. I do.

Q. You may describe that tunnel to the jury, I mean with reference to its construction, how it is built and of what it is constructed.

The COURT.—There is no dispute about that matter.

Mr. HEER.—None at all, simply to connect his testimony as we go along.

The COURT.—It don't seem to me it is necessary to go into it unless you have some point in the matter.

Mr. HEER.—We will abandon that.

(Testimony of James G. Wood.)

Q. Are you familiar also with the power-line which passed over that shed?

A. Every day that I was there at the mine travelled about the same course.

Q. Did you observe that power-line on the day of Mr. Benner's death with reference to its position, or referring to its position with reference to the snowshed, and the top of it? A. Yes, sir.

Q. What was the position of the wire with reference to the top of the snowshed?

A. It was resting on it, very near resting on it, getting close.

Q. What was the position of the wire immediately after Mr. Benner's death?

A. It was on the snowshed. [66]

Q. Had you observed those wires before the day of Mr. Benner's death? A. We had.

Q. Had you observed their position with reference to the snowshed? A. Yes.

Q. For how long a time.

A. For several days, two or three days, won't state exactly how many days.

Mr. MASSEY.—Did you say two or three days?

A. A day or so.

Mr. HEER.—(Q.) The first time you observed it, how far was the wire above the snowshed?

A. Well, they kept coming down all the time.

Mr. MASSEY.—I move to strike the answer out as not responsive to the question.

The COURT.—Read the question.

(The reporter reads the question.)

(Testimony of James G. Wood.)

Mr. HEER.—We consent.

The COURT.—Do you understand the question?

A. The first time?

Q. The first time you saw it how far was it above the snowshed? A. 3 or 4 inches.

Mr. HEER.—(Q.) And when was that, as near as you can tell us?

A. That was a day or so before the accident occurred.

Q. When you next observed the wire, how far was it above the shed?

A. It was on the shed the day of the accident, one wire.

Q. Did you observe the poles by which that wire was supported, I mean now on the day of the accident?

A. The guy-wire was broke and let the pole go over.

Mr. MASSEY.—I move to strike the answer out as not responsive.

The COURT.—Read the question.

Mr. HEER.—I consent.

(The Reporter reads the question.)

The COURT.—Just answer yes or no.

A. Well, yes.

Mr. HEER.—(Q.) What was the position of the first pole south of the snowshed with reference to its being perpendicular or otherwise, at that time?

A. It leaned a little to the north.

Q. What was the position of the second pole to the south of the snowshed at that time with reference to being perpendicular or otherwise?

(Testimony of James G. Wood.)

A. Leaning to the north.

Q. Did you observe any other wires than the guy wires and the power wires attached to the second pole to the south of the snowshed that day, any other wire attached to that pole, the second pole, except the guy wire? [67]

A. The second pole, there was a guy wire cut or broke.

Q. Then you did observe another wire attached to it? A. There was one, yes.

Q. What part of the pole was that attached to?

A. Top.

Q. Was the other end attached to anything at all?

A. No.

Q. When was the first time that you observed that condition, I mean the fact that the wire was loosened?

A. The day of the accident.

Q. Before or after the accident? A. After.

Q. How long after? A. Not very long after.

Q. An hour or more?

A. Might have been an hour.

Q. Mr. Wood, do you know one W. W. Wright?

A. I do.

Q. Who was he?

A. He was the man that we gave orders to, if we wanted anything done.

Mr. MASSEY.—I move to strike the answer out as a mere conclusion of the witness. The question calls for a conclusion of the witness, and does not call for a statement of fact.

The COURT.—The objection will be overruled.

(Testimony of James G. Wood.)

You may have an objection.

Mr. HEER.—(Q.) Orders with reference to what?

A. Well, if we wanted any electrical work done, we used to notify him to do it.

Q. Do you know by whom Mr. Wright was employed? A. By the Electric Company.

Q. The Truckee River General Electric Company?

A. Yes.

Q. Did you ever have any conversation with Mr. Wright before the time of this accident?

A. I did.

Q. With reference to that wire?

A. Well, I gave the electrician there orders to have the wire—

Q. Just answer the question yes or no.

A. I did.

Q. With Mr. Wright?

A. No, with my electrician.

Q. Did you have any conversation with Mr. Wright before the time of this accident with reference to that wire? A. No.

Q. You did not? A. No. [68]

Cross-examination.

Mr. MASSEY.—(Q.) You were the foreman of the mine, the Butters Company, Limited?

A. Yes.

Q. And had charge of the operation of the work there during the daytime? A. Yes.

Q. On the 18th of August, 1909? A. Yes.

Q. And how long had you been working at the Chollar-Potosi Mine prior to that date?

(Testimony of James G. Wood.)

A. A little over a year.

Q. In what capacity? A. As foreman.

Q. And you had known Clarence Benner all that time? A. Yes.

Q. And your duties as foreman were what, Mr. Wood?

A. To have charge of the workings of the mine.

Q. And did that include the operation through the snowshed that you have testified about?

A. Through the snowshed?

Q. Yes. A. Through the snowshed, yes.

Q. You had charge of the mine, and were running the cars through the snowsheds? A. Yes.

Q. And you had charge of the snowsheds?

A. Yes.

Q. And the track in the snowsheds? A. Sure.

Q. And all the operations that were carried on there through the snowsheds you had charge of?

A. Inside, yes.

Q. You didn't have charge of the rock-breaker?

A. Yes.

Q. You had charge of the rock-breaker?

A. Yes.

Q. And you knew that the rock-breaker was operated by electrical current? A. I did.

Q. And you knew the current was carried through this line you have testified to, to the rock-breaker?

A. Yes.

Q. Mr. Wood, you say you observed the wires passing over the snowshed either a day or so before the accident? A. Yes, they were above the shed.

(Testimony of James G. Wood.)

Q. That is what I say, passing over it?

A. Yes.

Q. And at that time you say that the wire was only about three inches above the snowshed?

A. A day or so before the accident.

Q. Yes, that is what I say, a day or so before the accident. A. Yes.

Q. And had you observed before that how high the wires had been above the [69] snowshed?

A. When we built the snowshed they were about 2 foot 6, above the snowshed.

Q. The lower wires? A. Yes, the lower wire.

Q. Did you build the snowsheds?

A. I did, I had them built.

Q. How high was the snowshed from the crest of the shed to the track on the inside at a point immediately beneath the power line?

A. From the floor up?

Q. Yes, from the track, railroad track.

A. About 7 foot 4.

Q. About 7 foot 4?

A. 7 foot 10, something like that.

Q. That was the height from the snowshed to the crest at that time? A. On the inside, yes.

Q. Do you know how high the poles were on each side of the snowshed above the crest, carrying these wires?

A. I know about how high, the length of the poles.

Q. The length of the poles above the ground?

A. Above the wire, yes. The first pole is 25 foot 4.

Q. Do you know what point on that first pole the

(Testimony of James G. Wood.)

topmost wire was?

A. The topmost wire, I do not.

Q. Was it on the top of the pole?

A. Somewheres about on the top of the pole.

Q. Somewhere about the top of the pole. Can you tell the Court and jury how far below the top of the pole the two wires that were in the same parallel plane upon the yard-arm were?

A. No, I could not, because I didn't go up there to measure.

Q. Have you any idea, having observed them during the construction, how high they were above the ground?

A. I know how high the first wire was above the ground; I measured it, 25 foot, 4, where it came off of the first pole.

Q. Of the first pole in what direction, to the north or south?

A. Where the electricity first comes off of the main line; that is the south pole.

Q. That is over here (indicating on map, Exhibit No. 1)? A. Yes.

Q. Do you remember a pole that stood on the dump between that? [70] A. Yes, that is 19 foot, one.

Q. From the ground to the yard-arm was 19 feet and one inch? A. From the ground to the wire.

Q. What wire do you refer to?

A. The west wire.

Q. The west wire? A. Yes.

Q. That was 19 feet and one?

A. About 19 foot and one inch, when I measured it.

(Testimony of James G. Wood.)

Q. And did you measure the pole, the first pole to the north of the snowsheds? A. Yes.

Q. How high was the first wire above the surface of the ground at that point?

A. 22 foot, 3 inches.

Q. 22 foot, 3 inches? A. Yes.

Q. And the snowshed to the crest, I understand, was 7 feet from the ground or track? A. Yes.

Q. Mr. Wood, when did you measure these three poles that you speak of?

A. About a month or so ago.

Q. Are the same poles there that were there at the time you speak of? A. Yes.

Q. At the time of the accident? A. Yes.

Q. Are the ground conditions beneath the power line, and at the point where these poles are sitting, the same they were at the time the accident occurred?

A. No.

Q. What difference is there in the ground conditions? A. Pulled them back to place.

Q. I am not speaking about pulling them back to place; I want to know whether the contour or surface of the ground is the same, or whether it is raised or lower in any place where the poles are?

A. The ground is about actually the same.

Q. That is what I want, not whether the poles had been pulled into place. A. About the same.

Q. Now, I will ask you to state, Mr. Wood, what time in the day was it that you visited the first pole to the south after the accident on the 18th of August?

A. The first day, what was the question?

(Testimony of James G. Wood.)

Q. What time or hour of the day did you visit the first pole to the south of the snowsheds on the 18th of August, the day of the accident? [71]

A. Sometime in the afternoon.

Q. And at that same time you visited the pole, the second pole to the south? A. Yes.

Q. And at that same day or at the same hour in the afternoon you visited the first pole to the north of the snowsheds? A. Yes.

Q. You say you saw the wires on the day of the accident, the morning of the accident, before it happened, was that correct?

A. Not the morning of the accident; I said a day or two before, and the morning the accident happened I noticed it.

Q. After the accident did happen?

A. Yes, after it did happen.

Q. Now, Mr. Wood, I will ask you to state how far above the crest of the snowshed was the west wire on the yard-arm, the lower wire?

A. The west wire?

Q. Yes.

A. It was on the shed at the time of the accident.

Q. And I will ask you to state if you observed the other two wires, the topmost wire and the east wire on the yard-arm?

A. Well, not much; I noticed the east one was a few inches away from the shed.

Q. And the topmost one, what was its condition?

A. Well, I could not state.

Q. Was the topmost wire slack on that occasion?

(Testimony of James G. Wood.)

A. About the same as the other wires were, accordingly.

Q. How many men were at work there that day?

A. 40 or 50 men in the mine, maybe a few more.

Q. Do you remember the day of the week on which that accident happened, Mr. Wood?

A. No, I do not; on the 18th of the month.

Q. It was the 18th of the month? A. Yes.

Q. Now, will you tell the Court whether it was the 17th or the 16th of the month that you observed those wires?

A. I could not tell; I could not tell whether it was the 16th or 17th, it was a few days before.

Q. It was a day or two before? A. A few days.

Q. Now, which was it, you stated a moment ago it was a day or two before, now you say a few days?

A. I believe I said in the first place, did I not, a few days before the accident?

Q. I am asking what you mean by a few days.

A. Might have been one or might have been two or three.

Q. Might have been one or might have been two or three? A. Yes. [72]

Q. Now, was it more than three days?

A. It was two or three days, a few days ahead of the accident.

Q. That is not an answer to my question. Was it more than three days?

A. I am telling you it was just a few days before the accident.

Q. What do you mean by a few days?

(Testimony of James G. Wood.)

A. A few days we talk about—

Q. I am not asking you what you talk about, I am asking you what you mean by a few days?

A. Two or three days.

Q. Two or three days, that is your definition now of a few days? A. Yes.

Q. When did you first see the guy-wire on the second pole to the south of the shed?

A. What was that?

Q. When did you first see the guy-wire attached to the second pole south of the snowshed?

A. It was hanging, it was only hanging there.

Q. I move to strike the answer out. I asked when he first saw it.

The COURT.—That part of the answer may go out. Do you understand the question? Read the question.

(The reporter reads the question.)

The COURT.—Just give the time.

A. After the accident.

Mr. MASSEY.—(Q.) Did you ever see that prior to the accident, ever see that guy wire prior to the accident? A. Never noticed it.

Q. Prior to the accident had you ever been as far south, or south to the point where the pole was located in the ground?

A. Been all around it everywhere, all over the mine.

Q. You never observed that guy wire until after the accident? A. No.

Q. And after the accident the guy wire was at-

(Testimony of James G. Wood.)

tached how? A. Fastened to an iron post.

Q. An iron post in what?

A. In the ground, a pipe.

Q. Was that pipe an old pipe that had been placed in the ground that day or did the evidence show it had been there a long time?

A. It had been there before.

Q. You had seen it before?

A. I don't know whether I ever seen it before; I seen it after the accident.

Q. What was its indication, that it was placed there that day or had been there before?

A. No, it was not placed there that day.

Q. I will ask you to state how the other end of the guy wire was attached, to what was it attached, when you saw it after the accident?

A. Just wrapped around the pole.

Q. The top of the pole or bottom of the pole?

A. Wrapped around the top.

Q. Then the first and only time you ever saw that guy wire it was attached to the iron pipe in the ground, and the top of the pole which carried the wires, is that right?

A. That was after the accident it was placed around [73] the pipe.

Q. Did you see it placed there?

A. No, I did not.

Q. I move to strike the answer out. You never saw it before that time or after that time, did you?

A. The wire was on the post and pipe after the accident.

(Testimony of James G. Wood.)

Q. Did you ever see the guy wire before that time?

A. I could not say whether I saw the guy wire before that time or not.

Q. That is what I am asking you about; you never saw it then, prior to the time you speak of, when it was wrapped around the top of the post and the iron pipe in the ground, is that correct?

A. That is the pole that was pulled back.

Q. Did you pull the pole back? A. I did not.

Q. Were you there when it was pulled back?

A. Was not.

Q. Do you know what the condition of that guy wire was of your own knowledge before that pole was pulled back? A. It was running to the north.

Q. The guy wire, I am not asking about the pole.

Mr. HEER.—Do you understand the question?

(The reporter reads the question.)

A. No.

(A recess is taken at this time until 1:30 P. M.)

Afternoon Session.

JAMES G. WOOD, cross-examination continued:

Mr. MASSEY.—What time of the day was it on the 18th of August when you visited the pole where the guy wire was to the south of the snowshed?

A. What time of the day?

Q. Yes. A. In the afternoon.

Q. What time in the afternoon?

A. I could not tell you, because I had so much work to attend to.

Q. Was it in the middle of the afternoon, late in the evening, or along towards dark?

(Testimony of James G. Wood.)

A. Somewhere in the middle of the afternoon.

Q. Between 2 and 4 o'clock, would you fix it?

A. Somewheres thereabouts.

Q. And between 2 and 4 o'clock when you visited that guy wire it was wrapped around the iron pipe?

A. It was not wrapped around the iron pipe at that time.

Q. When did you see it on that day that it was wrapped around the iron pipe?

A. The day after the accident it was on the pipe.

Q. I will ask you to state if you recollect of having testified of having been there the day after the accident at all? A. If I was there?

Q. If you have testified to that effect during your testimony here to-day? [74]

A. I don't understand the question.

Q. You don't understand that question?

A. No.

Q. Then the time that you did see the guy wire wrapped around the iron pipe was the day after the accident?

A. Yes, that was the day it was straightened up.

Q. I am not asking you about the day it was straightened up; I am asking you if it was the day after the accident? A. Yes.

Q. And were you there on the day of the accident?

A. I was.

Q. Where was the guy wire at the time you were there the day of the accident?

A. Fastened to the top of the pole.

Q. Where else was it fastened?

(Testimony of James G. Wood.)

A. It wasn't fastened.

Q. And you didn't see it fastened at any other place on the day of the accident?

A. Only at the top of the pole.

Q. And you didn't see the iron pipe there that day?

A. Not that day of the accident.

Q. You didn't see the iron pipe there? A. No.

Q. How was the iron pipe imbedded in the ground?

A. In the ground, and one end sticking out.

Q. How long was it?

A. Couldn't see one end of the pipe.

Q. Had the ground been disturbed there?

A. No.

Q. There was no disturbance of the ground at all?

A. Not around the pipe.

Q. Or any place else near by?

A. There was a hole there where the ground was originally.

Q. A hole there, where was that hole?

A. Just some impressions in the ground, that is all.

Q. You spoke of a hole, was it a hole dug in the ground or was it a natural depression in the ground?

A. It was old filled, where the pipe was laying on.

Mr. MASSEY.—I move to strike the answer out as not responsive to the question.

The COURT.—It may go out.

Mr. MASSEY.—(Q.) Was that hole a natural depression in the ground, or had it been dug there?

A. It had been dug there some time or other.

Q. Do you know when it was dug there?

A. I could not tell.

(Testimony of James G. Wood.)

Q. Did you examine to ascertain?

A. Did I examine the hole?

Q. Yes. A. Oh, no.

Q. You did not examine it? A. No.

Q. What time were you there on the day after the accident?

A. Half-past six in the morning.

Q. At what time?

A. I go to work at half-past six in the morning.

Q. Well, was that the hour you were at this pole at the extreme south on the next day after the accident? A. No, it was not.

Q. That is what I asked you, when you were at that pole the next day.

The COURT.—He said half-past six.

A. He asked me [75] what time I went to the mine on that day and I said half-past six in the morning.

Mr. MASSEY.—I am asking about the time you visited the pole where the guy wire was.

A. Somewheres in the neighborhood of 9 o'clock.

Q. Who was with you? A. I was alone.

Q. Who was with you the day before, or day of the accident, between 2 and 4 o'clock?

A. The day of the accident?

Q. Yes. A. Well, there was quite a few around.

Q. I have not asked you the number; I have asked you the name of some person, Mr. Wood.

A. Mr. Stone might have been with me.

Q. He might have been; well, do you know whether he was or not?

(Testimony of James G. Wood.)

A. I could not say.

Q. Well, now, can you name any person who was with you upon that occasion? A. I could not.

Q. And it was not after 6 o'clock or late in the evening you were there on the 18th of August, 1909?

A. No.

Q. It was before that time? A. Yes.

Q. Between 2 and 4? A. Somewhere.

Q. And did you make any measurements on that occasion, Mr. Wood, of the poles?

A. Not on that day.

Q. Did you make any measurements at any other point along the line of the power line on that day?

A. Not on that day.

Q. Not on that day? A. No, sir.

Q. Did you see Mr. Bulmer there that afternoon?

A. Mr. Bulmer went down there that afternoon.

Q. Did you see him there?

A. I don't know whether I did or not.

Q. Was he there when you were there; was he there making any measurements at any time that day when you were there?

A. Mr. Bulmer was down there.

Q. I am asking if he was making any measurements while you were there? A. I could not say.

Q. You could not say? A. No.

Q. What was the size of that iron pipe you speak of that was imbedded there in the soil?

A. I should judge about a 10-inch column; I never measured it, about a 10-inch column.

Q. 10-inch in diameter or circumference?

(Testimony of James G. Wood.)

A. In diameter.

Q. You are still employed by the Butters Company?
A. No, sir.

Q. What is your present employment?

A. Working at the Chollar mine, carpentering.

Q. For the Chollar Mining Company?

A. For a leasing company.

Q. What is the name of the company employing you?

A. Duval; Duval is the head of it, a man by the name of Duval.

Q. Do you know the name of the company?

A. No; Duval is leasing the Chollar and Potosi, I believe.

Mr. MASSEY.—That is all. [76]

[Testimony of D. P. Morgan, for Plaintiff.]

D. P. MORGAN, a witness called on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. HEER.

Q. What is your full name, Mr. Morgan?

A. Daniel P. Morgan.

Q. Where do you reside? A. In Virginia City.

Q. What is your business?

A. At the present time?

Q. Yes.

A. I am a carpenter at the Mexican Mill.

Q. How long have you resided in Virginia City?

A. Well, between Virginia and Gold Hill, 40 years.

Q. What was your business in the month of August, 1909?

(Testimony of D. P. Morgan.)

A. I was Deputy Sheriff in Virginia City.

Q. What county? A. Storey County.

Q. Did you know Charles J. Benner during his lifetime? A. Yes, sir.

Q. Did you know of his death at the time of his death? A. Yes, sir.

Q. Or about that time? A. Yes, sir.

Q. Mr. Morgan, are you acquainted with the corrugated iron snowshed that is connected with the Chollar Mine at Virginia City? A. Yes, sir.

Q. Did you observe that snowshed on the day of Mr. Benner's death? A. I did, yes, sir.

Q. Did you observe a power line passing over that snowshed upon that day? A. Yes, sir.

Q. How long after Mr. Benner's death were you at that place?

A. I was there within less than an hour.

Q. What was the position of the power line with reference to its height above the snowshed at the time you observed it on that day?

A. Well, there was one wire, I should judge about a little above the corrugated iron, I don't know the distance, but it was clear of the corrugated iron.

Q. How were the other wires?

A. They were a little bit higher.

Q. How was the first wire you have described held clear of the corrugated iron?

A. It was held on the south side of the snowshed, as they call it, with a 2 by 12 plank, I should judge a 2 by 12, I am not positive, but I know it was a plank, it supported the west wire.

(Testimony of D. P. Morgan.)

Q. How far was that plank from the snowshed?

A. Very near the snowshed.

Q. What do you mean by very near?

A. Well, might even been resting against the snowshed, I could not say exactly.

Q. Did you make any examination of the snowshed itself at that time? A. I did, yes, sir.

Q. What part of the snowshed?

A. Why, the ridge. [77]

Q. What part of the ridge of the snowshed with reference to the wire? A. How is that?

Q. With reference to the wire, where on the snowshed ridge?

A. Directly under this wire that was hanging a few inches above the snowshed.

Q. I show you a piece of corrugated iron, Mr. Morgan, and will ask you if you ever saw that before?

A. Yes, sir.

Q. You may state where you saw it.

A. The first time I saw it is immediately after I went down to the snowshed and seen the body of this Mr. Benner laying outside, and I then went through the snowshed; there is a ladder lying up against the snowshed, and I went up on that ladder, on top of the snowshed, and I seen where something had been wearing this ridge here, I then looked up onto the wire, and I see where she arced, and I had seen this arc here, and I looked at the wire and seen where the insulation of the wire had been wore, and had arced at this point.

Q. Just state, if you know, Mr. Morgan, what this

(Testimony of D. P. Morgan.)

piece of iron is? A. What it is?

Q. Yes.

A. That is the piece of iron I seen up there on the ridge of the snowshed, and two or three days afterwards I and the Sheriff went down as witnesses to have that cut off from the snowshed.

Q. Who cut off the piece of iron from the snowshed?

A. The carpenter working for the Butters Company, he was the man that handled the shears.

Q. Were you present? A. I was, yes, sir.

Q. Is that the piece of iron that was cut?

A. Well, I put my signature on it; that is my signature (indicating), and I am positive that is the piece of iron.

Q. In what condition is the piece of iron now with reference to the condition it was in when it was cut? What is the condition of it now with reference to its condition then?

A. I don't see any difference in it now and when we taken it off the building.

Q. Was this bright streak along the crest of the iron at the time you saw it first? A. Yes, sir.

Q. And was that hole as it is now through the iron? A. Yes, sir.

Q. Who else was present at the time that piece of iron was cut from the snowshed?

A. Well, there was the Sheriff.

Q. What was his name?

A. R. B. Hendricks. And Mr. Bulmer and this carpenter, if I ain't mistaken I helped the carpenter

(Testimony of D. P. Morgan.)

on the ridge to take that off, that is, kind of held the tin up for him to cut it with the shears.

Mr. HEER.—That is all. [78]

Cross-examination.

Mr. MASSEY.—(Q.) What was the carpenter's name?

A. I could not tell you his name, I don't know his name.

Q. Did you see him in the witness room a few minutes ago? A. Did I see him?

Q. Did you see the carpenter? A. No.

Q. What was his name?

A. No, I didn't see him; I have never seen the man since.

Q. You have never seen him since?

A. Never seen the carpenter since, no, sir.

Q. And he is the one that chopped that piece of iron off the corrugated roof?

A. I am almost positive that he handled the shears, yes, sir.

Q. And you only saw him on that one occasion, and have never seen him since?

A. What I mean on that occasion; I had seen the man before; in fact, while I was coming from Reno I brought the man into town, that is, he was walking into Virginia; I picked him up and brought him in.

Q. You never saw him before that time, did you?

A. I say I brought him into Virginia.

Q. When?

(Testimony of D. P. Morgan.)

A. Why, it must have been months before that.

Q. Did you see him in Virginia City between the time you brought him there and the time that he cut the corrugated iron off, between those two periods? A. Yes.

Q. Have you seen him since, A. No, sir.

Q. Never have seen him since? A. No, sir.

Q. Now, Mr. Morgan, you went there with the Sheriff on that day?

A. That is the day we cut the iron.

Q. Yes, that is what I am speaking of?

A. Yes.

Q. What time in the day did you go there?

A. Well, now, I could not state the time of the day, I don't remember what time it was.

Q. Do you remember what day it was?

A. It was either the day or day after Mr. Benner had been killed.

Q. Was the date put on by any person who was there at that time, on the piece of iron that was taken off? A. I think the date was, yes, sir.

Q. You think it was? A. Yes, sir.

Q. Do you remember who put the date on?

A. No, that I could not say.

Q. And this white streak on this iron was there, extending from practically near the lower end, clean up to the word "West" on the opposite end?

A. Yes, sir.

Q. That worn streak was there at the time you went there? A. Yes, sir.

Q. And these holes, did you observe all those holes

(Testimony of D. P. Morgan.)

in this iron at that time? A. No, sir.

Q. You did not observe all the holes?

A. That is, I didn't take any [79] notice of those holes.

Q. Didn't take any notice of any hole except the particular one your attention was called to, is that it?

A. My attention was not called to it at all, I noticed that myself, and I see that the rubbing on that was the cause of—

Q. I am not asking you what was the cause, I am asking you what you noticed.

A. I noticed where she arced, that is all I noticed.

Q. You noticed where she arced? A. Yes.

Q. And you noticed the bright spot extended from one end of this piece of iron to the other?

A. Yes, sir.

Q. Did you examine the insulation on that wire?

A. Yes, sir.

Q. And how much of an arc or how much of a puncture was there on the insulation of the wire at that time? A. Why, where she arced was just a spot.

Q. How big a spot?

A. She had been wore black, I guess, on the wire.

Q. I am asking you where it was punctured how big a spot it was.

A. I didn't have any rule.

Q. You didn't have any rule?

A. No, sir, I didn't have any rule.

Q. Have you any idea from having examined it

(Testimony of D. P. Morgan.)

without a rule, how much of a puncture there was in the insulation?

A. Where she arced there was just simply, if I remember right, the spark of the arc, but farther back, could see the insulation worn off, but not through to the copper.

Q. Further back where?

A. From the place where the puncture was, maybe just a little bit; you see the snowshed ran at an angle like this, and this wire came across at an angle like this (illustrating), I don't think there was over a foot of the insulation worn off, that is, not worn off clear of the wire, but where she had arced, of course the insulation was wore off clear from this arc.

Q. Then the insulation was not worn on that wire into the wire, except at the place where the puncture was? A. To the best of my recollection.

Q. And there was insulation upon that wire from that puncture both ways, as far as you examined it?

A. Oh, the insulation was what we call the old style insulation.

Q. I am not asking you what you call it, I am asking you if there was not insulation on that wire from the puncture in both directions where you examined it?

A. There was spots maybe farther back.

Q. I am not asking you whether there were spots farther back; did you see any puncture in that wire at any other place than the particular place you have mentioned? A. I didn't notice it.

Q. You didn't notice it?

(Testimony of D. P. Morgan.)

A. I didn't notice it. [80]

Q. I will ask you to state what the insulation was composed of, whether iron or cloth, or what?

A. I could not exactly say, the insulation was old-fashioned insulation, after being exposed to the air for a few years, she wears off in certain spots.

Q. I am asking you whether it was hard or soft, or what?

A. I never felt of it because the juice was on.

Q. You never felt of it because the juice was on?

A. No, sir.

Q. And the juice was on when you were there then on the day of the accident?

A. Yes, sir. That is, I say the juice was on, I supposed it was, I never touched it at all to find out, I don't know.

Q. What time of the day on the 18th were you there?

Q. What is the 18th, the day he was killed?

Q. The day he was killed.

A. I judge just about dinner time, between 11 and 12.

Q. And what time of the day were you there on the 21st at the time the corrugated iron was taken from the roof there, the roof of the snowshed?

A. I don't remember, I don't remember what hour of the day it was.

Q. Were you on the roof on the 18th, immediately after you got there? A. Yes, sir.

Q. And did you have hold of the wire on that occasion?

(Testimony of D. P. Morgan.)

A. No, sir, I never touched the wire at all.

Q. At that time I will ask you to state if the wire was not supported by a plank from the ground?

A. On the 18th?

Q. Yes. A. I am satisfied it was.

Q. And how was it on the 21st when you were there?

A. Well, now, I could not tell you, I don't know whether I noticed the plank on the 21st or not; I know the wire was above the roof on the 21st; that is it was high enough for us to get in carefully and cut that iron or ridge off.

Q. And did you observe more than one wire on the 18th when you were on the roof there?

A. I observed the three wires, yes, sir.

Q. Now, how high above the roof was the highest wire at that time?

A. I didn't take particular notice of the highest wire.

Q. You didn't take particular notice?

A. No, it was clear of the snowshed altogether.

Q. I will ask you to state how the wires were arranged with relation to each other at that time?

A. Well, there was the three wires crossing the ridge; there was the center wire say, and at least two feet or more above, the two side wires, and the side wire was the low wire, that is, the west [81] wire.

Q. The west wire was the low wire?

A. Was the lowest wire.

Q. And it was raised above the roof by means of the prop in the shape of a 2 by 12 plank?

(Testimony of D. P. Morgan.)

A. I think it was a 2 by 12, yes, sir.

Q. How far was the east wire that you observed above the roof at that time?

A. That was a little higher than the west wire.

Q. And notwithstanding the plank?

A. That didn't have no brace on the east wire.

Q. You mean there was no plank supporting the east wire? A. I didn't notice any plank.

Q. And there was a plank supporting the west wire, and at that time the plank supporting the east wire was higher than the west, as I understand?

A. It was clear of the ridge, yes, sir.

Q. You say the plank supporting it was very near the snowshed and might have been resting against the snowshed; did you observe sufficiently close at that time to ascertain the length of the plank that was supporting the west wire, immediately after the accident?

A. Well, I tell you what I think, I observed that the plank was above the ridge high enough above the ridge, that is above the ridge enough to raise that wire.

Q. You testify that the plank was long enough to raise the wire from the crest of the ridge?

A. Yes, sir.

Q. Now, did you observe how long the plank was?

A. No, I could not tell you exactly.

Q. You have no impression as to that fact at all?

A. No, sir, not to that fact.

Q. You never saw the crest of that building before the 18th of August?

(Testimony of D. P. Morgan.)

A. Never was on the roof, no, sir.

Q. Never was on the roof there? A. No, sir.

Q. And you were never on any part of that roof, other than the part that you visited at the time of the accident, either before or after the accident?

A. No, sir.

Q. You are not an electrician, Mr. Morgan?

A. I have done some work, yes, sir.

Q. Done some work in electricity? A. Yes.

Q. I will ask you again if you are familiar with the insulation used upon wires of that kind for the purpose those wires were used at the time?

A. To a certain extent, yes, sir.

Q. I will ask you to state if that insulation was metallic, or something soft and not metallic?

A. Well, when the wires were first put up I have seen the effects of it, it is soft.

Q. I am speaking about the particular wire you visited that [82] day.

A. It was soft, but it had become hard, I should judge, looking at it. I have taken down lots of that wire, and it is very hard after a few years' exposure.

Q. I am asking you about the particular wire there, and not that that you took down, unless you took that down. I am asking you to state if the insulation on that wire was metallic, or did it more resemble a cloth with some stuff mixed with it?

A. I could not tell you about that.

Q. And the only puncture you saw was the puncture at the particular point you have indicated, exposing the wire? A. Yes.

(Testimony of D. P. Morgan.)

Q. And the wire was not exposed at any other place or any other point?

A. I didn't look back, I didn't see any. I just looked at that one spot across the snowshed.

Q. And that one spot was less than a silver dime in size?

A. It is three years ago, a long time to look back, I could not say.

Q. You would not say it was larger than that?

A. To the best of my recollection it was a small arc, I should judge an arc something like on the ridge there.

Q. A small exposure on the wire? A. Yes.

Q. And there was no other exposure that you saw on that occasion? A. No.

Mr. MASSEY.—That is all.

Redirect Examination.

Mr. HEER.—(Q.) You have used the term arc in referring both to the piece of iron and the wire; will you explain what you mean by that term?

A. Well, a live wire if she comes in contact with the ground, she arcs; she'll burn the minute she comes in contact with the ground; the minute it makes a ground, it arcs.

Q. I mean specifically the term arc as applied to this wire and piece of iron.

A. The minute she touched the snowshed, she might not have grounded until a certain time, something caused her to ground, might not have grounded on the snowshed when she first touched it, but the minute she made a ground, why she arced; the snow-

(Testimony of D. P. Morgan.)

shed might be clear of the ground altogether, and she'd not arc, but the minute something touched the snowshed that made a ground, she'd arc right there.

Q. That is what I want to get at. You have told us when it arced, that is to say when something connected with the ground, that it might arc; now tell us what you mean by arcing, when you say it arced, what do you mean?

A. By a live wire coming in contact with the ground, it must come in [83] contact with something that is a conductor, not a non-conductor but a conductor, if it was in contact, laying on wood, dry wood, she'd not arc, but the minute that became wet and she touched the ground, made a ground of it, she'd arc.

Q. That is, when the live wire became connected with something a conductor with the ground?

A. Yes, with the ground.

The COURT.—(Q.) What did this come in contact with to arc?

A. Well, I had seen this man's shoe laying there, and the shoe was burnt across here (showing), judging from where we took off the side of the building, and smelling the flesh—

Q. What came in contact there which caused the wire to arc?

A. If a man put his foot against that "T" rail and the rail connected with the ground; it would be all right if he didn't touch that "T" rail, the track rail, he could lean up against that building, but the minute he was against the building, and the wire was

(Testimony of D. P. Morgan.)

on the ridge, and he touched that "T" rail, it burnt off the toe there, that made a ground, made what we call a ground.

Mr. HEER.—(Q.) Mr. Morgan, speaking of the angle at which this wire crossed the shed, you illustrated with your fingers, can you in words tell us what that angle was?

A. The snowsheds ran east, a little north of east, almost east, and the wires ran at an angle of more than 45 degrees, ran more northerly, almost directly north.

Q. I call your attention, Mr. Morgan, to a blue-print upon the board, being Plaintiff's Exhibit No. 1, and to a line marked "Main line," running from right to left, and to another line marked "Snowshed," running from the top toward the right side of that blue-print, and to the angle which they formed, and I will ask you how that angle compares with the angle at which the wires crossed the snowsheds?

A. This is the main line (indicating)?

Q. Is the main line so marked?

A. If that map was turned a little more, this is the snowshed, as I say it is running east a little north, and the line was running north, that is almost the angle, about at an angle of 45, more than 45; the line crossed the snowshed, it looked to me not directly straight across, but a little bit of an angle, [84] just a slight angle.

Mr. HEER.—I offer, if the Court please, the piece of corrugated iron, and ask that it be marked Plain-

(Testimony of D. P. Morgan.)

tiff's Exhibit No. 2.

Mr. MASSEY.—We do not object, if your Honor please.

The COURT.—It will be admitted then.

Recross-examination.

Mr. MASSEY.—(Q.) Did you make any measurements to ascertain at what angle the main power line crossed the snowshed at any time?

A. Just judging from—

Q. I ask you if you ever made any measurements?

A. Not exactly, no.

Q. And you don't know what the angle was, as a matter of fact?

A. I know it was less than 20 degrees, and I know at least 40 or more.

Q. It was less than 20 or more than 40, is that right? A. I did not say less than 20.

Mr. BROWN.—You said less than 20.

A. I said it was more than 20 degrees; I know it was not less than 20 degrees; at least more than 20 degrees, and almost, I am satisfied almost 45, or more.

Mr. MASSEY.—(Q.) Then you can come within $\frac{1}{5}$ of the circle, from what you saw there, estimating the angle upon which that passed over the snowshed?

A. Pretty close to it, yes, sir.

Q. And that is as close as you can come, 25 per cent of it? A. Yes.

Q. Now, Mr. Morgan, I will ask you to state if an arc is not the point on the wire where the electricity escapes? A. When she touches the ground.

(Testimony of D. P. Morgan.)

Q. When she touches the ground or anything that is grounded?

A. Or anything that is grounded.

Q. It don't have to touch the ground?

A. The wire don't have to touch the ground, if it comes in contact with something that is grounded.

Q. And could you tell from an examination of that wire that day when that puncture was burned into the insulation, whether that day, or a week or two weeks before that?

A. I could not tell that, no, sir.

Q. Do you know whether that puncture in the wire, and the puncture in that, was made that day or two weeks or four weeks before that day?

A. I could not swear to that.

Q. And the only puncture that you found, and the only burning you found on the wire, was the puncture at the point you have indicated, which was a small puncture, and you cannot tell when that was made?

A. I could not state, no.

Q. Did you examine that snowshed to find out whether there was any metal leading from the top [85] of the crest down to the ground, any iron?

A. No, sir.

Q. Do you know whether the corrugated iron extended all the way to the ground from the crest in connection with that ground at any point along that snowshed?

A. I could not say, I didn't examine it.

Q. And you don't know what caused the puncture of the insulation that was burned on the wire imme-

(Testimony of D. P. Morgan.)

diately over the crest?

A. I didn't see the cause; I didn't see the arc, if I had seen the arc, I would know the cause.

Q. And you don't know when it was made?

A. No, sir.

Q. If it had been a new puncture made that day, are you electrician enough to have ascertained that fact?

A. Well, I know it was that day, that is, I went down, I smelled the burning piece of tin, and I knew there was an arc there, and the burn, I could tell that.

Q. I am not asking you that. I ask to have the answer stricken out.

The COURT.—Strike the answer out and read the question.

(The reporter reads the question.)

Q. Answer the question yes or no.

A. Not on the ridge, I could not tell whether that puncture was made that day or not.

Q. Could you tell from the examination of the puncture in the insulation, if you had examined it, whether it had been made that day, or sometime prior to that day?

A. I might have if I got close to the wire, I could have smelled the insulation burning a little bit.

Q. You did not smell it that day?

A. I did not smell the insulation.

Q. And did you try to smell it that day?

A. No.

Q. And did not examine it for the purpose of as-

(Testimony of D. P. Morgan.)

certaining whether it was made that day or not?

A. No, I did not go near the wire.

Mr. MASSEY.—That is all.

Mr. HEER.—I now offer in evidence the deposition of E. C. Gerrey, taken on behalf of the plaintiff.

Mr. MASSEY.—I believe, under the practice, the deposition will have to be read in evidence, and we have the right to interpose our objections when the questions and answers are read.

The COURT.—You may proceed.

(Mr. Mashburn, on behalf of the plaintiff, reads the direct examination of the deposition of E. C. Gerrey to the jury, and the following objections are renewed:)

“Q. Do you know what the condition of that line was at the snowshed on the date of [86] Benner’s death?

A. Well, there was a wire on the roof, I know that.

Mr. HAWKINS.—I move to strike the answer because not responsive to the question.”

Mr. HAWKINS.—I want to renew that motion at this time, if the Court please, in the record.

The COURT.—That may go out.

“Q. Now, Mr. Gerrey, if the wire were not slack by taut, how high would it be above that snowshed at that time?

A. I do not remember how far it was.

Q. Well, as nearly as you can tell.

A. Well, I can’t answer that without knowing. Well, I should judge a few feet.

Mr. HAWKINS.—Strike the answer as not be-

ing responsive to the question and being imagination of the witness and not any definite answer."

Mr. HAWKINS.—He says, "I can't answer that without knowing," and then he says, "Well, I should judge."

The COURT.—I will allow the answer to stand.

"Q. What effect did the leaning of that pole have upon the wire passing over the snowshed?

Mr. HAWKINS.—Objected to as incompetent, calling for conclusion of witness which is a matter that the jury may determine from the facts as well as the witness can draw a conclusion. It is incompetent."

Mr. HAWKINS.—Renew the objection, if the Court please.

The COURT.—I don't think it makes much difference. That can go out. I don't want that to be considered a precedent. The question is what would be the effect on the two poles on which the wire was suspended if they leaned together?

"Q. Mr. Gerrey, do you know whether or not that guy wire was ever replaced upon that bolt?

A. It was.

Q. When? A. On the evening of the accident.

Q. Do you know who replaced it?

Mr. HAWKINS.—I object to the question as being incompetent, calling for matters that transpired after the accident and not being part of the *res gestae*, and not in any way connected with the incident and in no way binding upon the defendant company."

Mr. MASSEY.—We renew the objection, if the Court please.

Mr. HEER.—We do not insist upon the question.

The COURT.—You do not resist it?

Mr. HEER.—No.

(Mr. Hawkins, on behalf of the defendant, reads the cross-examination of the deposition of E. C. Gerrey, and the following objections are renewed:)

“Q. From your observation of that wire over the snowshed did you or not regard it as a matter that needed immediate attention as being a very [87] dangerous matter or not?”

Mr. HEER.—I object. Incompetent, irrelevant and immaterial. Calling for the conclusion of the witness and not cross-examination concerning anything inquired into in chief.

Mr. BROWN.—We insist on the objection.

The COURT.—I shall sustain the objection. You may have an exception.

Mr. MASSEY.—If your Honor please, we desire to take an exception to the ruling of the Court for the reason that the answer sought to be elicited by the question is within the issues of the case, and it goes to the matter of the degree of negligence as shown by the testimony of the witness who is being examined, upon the question of notice to the company at the time of the alleged negligence, if any, existed. And also, if the Court please, it goes directly to the question as to whether or not the company was guilty of that degree of negligence that counsel has insisted, and was seeking to prove by the

evidence of the witness who was then being examined, and it appearing that the witness himself was competent to testify as to the conclusion involved, being an electrician, and the electrician of the Butters Company, the conclusion of the witness, or the opinion of the witness was material upon that ground of competency.

“Q. Do you know whether or not the foundation of the old mill site near this guy-wire was blasted out, or turned down?

Mr. HEER.—I object to the question as incompetent, irrelevant and immaterial, and being improper cross-examination, as it touches no subject inquired into in the examination in chief.”

Mr. HEER.—I insist upon the objection.

The COURT.—I don't think it is very material anyway; I will let that in.

[Testimony of Sidney M. Stone, for Plaintiff.]

SIDNEY M. STONE, a witness called on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. HEER.

Q. State your full name, Mr. Stone.

A. Sidney Marvin Stone.

Q. Where do you reside?

A. San Francisco, California.

Q. Where did you reside in August, 1909?

A. Virginia City, Nevada.

Q. For how long prior to that time had you resided in Virginia City? A. A little over three years.

Q. What was your business in August, 1909?

(Testimony of Sidney M. Stone.)

A. Manager of Charles Butters Company, Limited.

Q. How long before that time had you occupied that [88] position? A. About three years.

Q. Did you know Clarence J. Benner in his lifetime? A. I did.

Q. Have you recollection of his death?

A. I have.

Q. Were you at the Chollar Mine upon the day of Mr. Benner's death? A. I was.

Q. Did your business take you there?

A. It did.

Q. Were you there on the days preceding his death? A. Yes.

Q. That is, I mean was that within your employment? A. Yes.

Q. Did you on the day of Mr. Benner's death observe the power line passing over the snowshed connecting with the Chollar Mine? A. I did.

Q. Was that before or after his death on that day?

A. After.

Q. How long after his death?

A. I could not say just exactly how long after.

Q. Can you fix the time of day?

A. I think it was somewhere between 11 and 12.

Q. What was the position of the wire with reference to the top of the snowshed at that time?

A. One wire was on the snowshed.

Q. Did you at that time observe the position of the pole south of the snowshed with reference to its being erect, or otherwise, the first pole south of the

(Testimony of Sidney M. Stone.)

snowshed? A. Yes, I did.

Q. What was its position?

A. It was inclined towards the snowshed.

Q. Did you at the same time observe the second pole south of the snowshed? A. Yes.

Q. What was its position with reference to being erect, or otherwise?

A. That was inclined a little bit to the north.

Q. Were there any other wires attached to the second pole south of the snowshed at that time, except the power line? A. I don't remember.

Q. Was that pole supported in any way?

A. It was not.

Q. Do you know whether it had been before that day supported in any manner, the second pole south of the snowshed?

A. Well, I don't know, I presume it had.

Q. Do you know how long the two poles south of the snowshed had been leaning, as you have described them, before the day of Mr. Benner's death?

A. Well, that was the second time, I think, that I had noticed that they were leaning.

Q. Well, how long before his death had you known of that condition?

A. If I remember rightly, it was about two weeks.

Q. About two weeks? A. About two weeks.

Q. Do you know one W. W. Wright? A. I do.

Q. Did you know him during July and August, 1909? A. I did.

Q. Do you know what his business was at that time?

(Testimony of Sidney M. Stone.)

A. He was employed by the power company.

Mr. MASSEY.—Move to strike the answer out as not responsive to the question. [89]

The COURT.—You will be required under the objection to answer yes or no, and then they will follow it by another question.

A. Yes.

Q. (Mr. HEER.) What was his business at that time?

A. He was employed by the Truckee River General Electric Company.

Q. Where? A. In Virginia City, Nevada.

Q. In and about what work, if you know, for the company?

A. He had charge of the lines and the substations.

Mr. MASSEY.—Object and move to strike.

Mr. HEER.—I consent.

Q. Just state what Mr. Wright was doing for the company, if you know?

A. Well, I bought supplies from the power company, through him; and any time when we had troubles on our lines we called upon Mr. Wright for assistance in fixing them, that is, the lines that belonged to the power company in connection with our work.

Q. And when you made such calls, did you or did you not receive the assistance you asked for?

A. We always did.

Q. When you speak of the power company what company do you mean?

A. Truckee River General Electric Company.

(Testimony of Sidney M. Stone.)

Q. Did you have any conversation with this Mr. Wright prior to the death of Mr. Benner?

A. I did.

Q. With regard to the power line mentioned?

A. I did.

Q. When was that first?

A. The first time was some time prior to the 18th of August.

Q. Well, how long time prior to that time, Mr. Stone, as nearly as you can tell us?

A. It is a long time to remember just exactly, but it was in the neighborhood of two weeks.

Q. What did you say to Mr. Wright at that time upon that subject?

A. I called his attention to the fact that the line was sagging and somebody should fix it up, whether it was up to us, or whether it was up to the company, I did not know at that time; he said it was up to the company, the power company to fix it.

Q. He said it was up to the power company to fix it? A. Yes.

Q. Can you recall what you said to Mr. Wright with reference to the condition of the wire at that time?

A. I don't remember exactly what I did say, except that the condition of the line had been called to my attention by—

Mr. MASSEY.—Move to strike it out as not responsive to any question.

The COURT.—Read the question.

(The reporter reads the question.)

(Testimony of Sidney M. Stone.)

The COURT.—Under that objection you will answer yes, and then he will ask you what it was.

Mr. HEER.—You may answer the question, Mr. Stone.

The COURT.—Answer either yes or no.

A. Yes.

Q. (Mr. HEER.) What did you say to him? [90]

A. I explained to him the condition of the line, that is, that the condition of the line had been called to my attention by our electrician, and asked if he was going to fix it, and he said he would; that is as much as I can remember generally about what I said.

Q. Did you or did you not tell Mr. Wright what the condition of the wire was?

A. I told him that the lines were sagging down.

Q. Did you tell him where they were sagging down?

Mr. MASSEY.—If the Court please, I would rather not have a question put direct to this witness, he is an intelligent man, and it is leading.

Mr. HEER.—I withdraw it.

Q. Did you or did you not state to Mr. Wright where the wires were sagging?

A. That particular line that ran across the snowshed.

Mr. MASSEY.—Move to strike out as not responsive to the question.

Mr. HEER.—It may be stricken out. Answer yes or no, Mr. Stone.

A. Yes.

Q. Where did you tell him it was sagging?

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(Testimony of Sidney M. Stone.)

A. The line that crossed the snowshed over the Chollar Mine.

Q. Do you know whether or not Mr. Wright after that conversation went to the Chollar Mine or to the place where this line crossed the snowshed?

A. I don't know personally.

Q. Did you have any other conversation with Mr. Wright upon that subject?

A. Yes. The morning of the 18th of August, I spoke to him about the condition of the line again.

Q. Do you remember what time in the morning?

A. It was in the neighborhood of 8 o'clock.

Q. Where did the first conversation you have mentioned occur?

A. I don't remember now whether it was on C Street in Virginia City; I don't remember the exact spot.

Q. It did occur in Virginia City, however?

A. Yes.

Q. And the second conversation, where did that occur?

A. That occurred right by the corner of the Agency of the Bank of California Building in Virginia City.

Q. What did you say to Mr. Wright at that time?

A. I told him that the electrician had reported in that the line was coming down on the roof, and asked him when he was going to fix it, it needed attention right away.

Q. What did Mr. Wright say to that?

A. He said he would fix it up, he was going to

(Testimony of Sidney M. Stone.)

Yerington that day, or going somewhere, and he would take a look at it as he went over.

Q. Do you know whether Wright did look at it that morning? A. I do not.

Q. Mr. Stone, can you tell us how high the wire was above [91] the snowshed at the time you first spoke to Mr. Wright.

A. I don't remember just exactly how far it was.

Q. Will you give us your best recollection on that subject?

A. I believe it was between 6 inches and 12 inches.

Q. Can you tell us how high the wire was above the snowshed the second time you spoke to Mr. Wright? A. I didn't see it that morning.

Q. How long before that morning had you seen it last? A. Several days.

Q. A week or less than a week?

A. I don't remember just exactly how many days before the morning of the 18th.

Q. Did you have any other conversation with Mr. Wright upon that same subject?

A. I don't remember of any more prior to the 18th of August.

Mr. HEER.—That is all.

Cross-examination.

Mr. MASSEY.—(Q.) How long did you reside in Virginia City prior to the 18th of August, 1909?

A. It was about three years.

Q. And during that time what was your employment? A. Manager of the Butters Company.

Q. And where was the Butters Company operat-

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(Testimony of Sidney M. Stone.)

ing in Virginia City?

A. They operated a *mile* and the cyanide plant in Six Mile Canyon, and a lease on the Chollar and Potosi Mine in Virginia City.

Q. How frequently were you at the lease on the Chollar-Potosi Mining Company?

A. Sometimes I would go every day and sometimes be three or four days between trips.

Q. And you had entire charge of the business of the Butters Company at Virginia City, including the mining operations on the Chollar and Potosi?

A. That is, I had the general overseeing.

Q. What was your particular title in that company, Mr. Stone?

A. I signed the checks as manager.

Q. You signed the checks as manager?

A. Yes, sir.

Q. Who was the electrician in charge of the company's property at the Chollar-Potosi?

A. A man named Ernest Gerrey.

Q. And he had charge of that department?

A. Yes.

Q. Under you as general manager, or manager?

A. Yes.

Q. Now, Mr. Stone, how long had you known Mr. Wright prior to the 18th of August, 1909?

A. I think I had known Mr. Wright almost the entire time I had been in Virginia City.

Q. And you [92] bought what kind of supplies from him?

A. Electrical supplies, insulators and wire and

(Testimony of Sidney M. Stone.)

poles, general electrical supplies.

Q. Where was the place of business of the Truckee River General Electric Company at Virginia City at the time you purchased these supplies?

A. At the substation principally, I think.

Q. Where was the substation in Virginia City?

A. It was situated down near the Con-Virginia shaft.

Q. It was there you went for the purpose of purchasing supplies?

A. We sent there or phoned.

Q. Do you know who else was there at the substation in Virginia City?

A. Why, there were two or three substation tenders.

Q. Did you ever buy any supplies of any other person at Virginia City other than Mr. Wright?

A. I don't think we did.

Q. I am not asking you what you think, Mr. Stone, I am asking you what you did?

A. I don't remember of ever buying any.

Q. You don't remember of ever buying any?

A. No.

Q. Do you know who the other parties were at the substation other than Mr. Wright?

A. I don't remember their names.

Q. Did you ever purchase any supplies of Mr. Wright any place other than at the substation?

A. Well, that I don't remember.

Q. Well, did you ever purchase any supplies yourself of Mr. Wright? A. No.

(Testimony of Sidney M. Stone.)

Q. I will ask you to state if you were ever present at any time when any of the employees of the Butters Company purchased supplies of Mr. Wright?

A. No, I was not.

Q. And what you know of the purchase of supplies from Mr. Wright as the agent of the company is mere information you have gained from the sub-employees of the Butters Company.

A. I will take that back; I did buy several things from Mr. Wright over the phone.

Q. And where did you phone him?

A. I phoned him at the substation.

Q. And the reason you say you purchased from Mr. Wright is because he answered the phone?

A. I asked for Mr. Wright and Mr. Wright answered.

Q. When you asked in the first instance did you know whether Mr. Wright was at the phone, or somebody else responding on his behalf?

A. Somebody else may have responded, but Mr. Wright always said "This is Wright" when he was on the phone.

Q. There were other people there you knew of at that time? A. Yes.

Q. The only supplies you ever purchased from Mr. Wright was at the substation when you called and asked for Mr. Wright over the phone? [93]

A. Yes.

Q. And the other supplies you speak of were purchased by agents of the company, of which you never knew except what you may have gained from their

(Testimony of Sidney M. Stone.)

statement? A. That is so.

Q. Now, I will ask you to name an instance if you can where you directed Mr. Wright to assist you in putting this line in repair, other than the one you have spoken of respecting the transaction involved in this litigation.

A. I don't quite understand that, Judge.

Q. When at any time prior to the trouble which caused the death of Mr. Benner did you ever direct or request Mr. Wright to do any work on the power line of the Truckee River General Electric Company? A. The morning of the 18th.

Q. I am speaking of prior to that time.

A. About two weeks, I think it was.

Q. And concerning what part of the line?

A. That was concerning the condition of that entire line.

Q. Concerning this line that caused the trouble on the 18th? A. Yes.

Q. On some other occasion is what I am asking about, Mr. Stone, and not that occasion.

A. I don't remember of any other occasion, Judge.

Q. Is it not a fact you never asked Mr. Wright to do anything upon any power line connected with the Butters plant, either directly or indirectly, except so far as this line was concerned passing over the snowshed, out of which this accident grew?

A. Oh, no, that is not so, Judge.

Q. Name one, is what I am asking you.

A. Several times when we had trouble during the stormy weather down at the plant we called up Mr.

(Testimony of Sidney M. Stone.)

Wright, both myself and other members of the company.

Q. Called him up where?

A. At the substation or at his house.

Q. And asked for Mr. Wright?

A. And asked for Mr. Wright.

Q. Name one of those times.

A. I could not name any specific particular time.

Q. What kind of trouble was it?

A. When the power would go off, or when something would happen to our transformers.

Q. Your transformers, or the Truckee River General Electric Company transformers?

A. Our transformers, or the meters.

Q. Your meters and not the Truckee River General Electric Company meters?

A. Yes, the meters, though, were subject to inspection by the Truckee people.

Q. Under a contract? A. Under a contract.

Q. When they were out of order or your transformers were out of order, you asked Mr. Wright to come and look at them, [94] didn't you?

A. Yes.

Q. And you asked him why, why the transformers were out of repair?

A. Not particularly why the transformers were out of repair, but why was the power in such condition that it put our transformers out of repair.

Q. Well, did the power put your transformers out of repair, or was it the weather that was causing the trouble?

(Testimony of Sidney M. Stone.)

A. It was primarily the weather, but sometimes it was the power.

Q. And what did Wright do when he found your transformers out of repair?

A. It depended exactly upon what the particular point was; if we were getting too much power they shut the power down at the substation.

Q. Who shut it down?

A. I don't know who shut it down.

Q. You don't know who shut it down?

A. No, Mr. Wright was always asked to attend to that business because he was the only man I knew who had any charge up there.

Mr. MASSEY.—I move to strike the answer out as not responsive to the question, the part of the answer "because he was the only man I knew who had any charge up there."

The COURT.—That may go out, the last clause of the answer.

(An adjournment is taken at this time until Wednesday, April 17th, 1912, at 10 o'clock A. M.)

Wednesday, April 17th, 1912, 10 A. M.

SIDNEY M. STONE, cross-examination continued.

Mr. MASSEY.—(Q.) Mr. Stone, I will ask you to state if you know the name of any other employee of the Truckee River General Electric Company that you met at Virginia City?

A. Wyman Evans and Fred Somers, those were all that I remember of.

Q. Who else did you meet there connected with the

(Testimony of Sidney M. Stone.)

company, did you meet Mr. Campbell? A. Yes.

Q. Did you meet Mr. Lukes? A. Yes.

Q. Did you meet Mr. Broilie?

A. Mr. Broilie was not connected with the company when I met him.

Q. But you know that Lukes was connected with it?

A. No, I did not; I had an idea that Mr. Lukes was not connected with the company.

Q. I will ask you to state if upon the former trial of this case you did not testify that you met Mr. Lukes who was connected with the company at Virginia City during the time you were in the employ of the Butters Company.

A. I don't remember so testifying.

Q. You don't remember? A. No.

Q. You knew that Mr. [95] Campbell was connected with the company? A. Yes.

Q. Officially? A. Yes.

Q. Now, Mr. Stone, calling your attention to the first conversation that you had with Mr. Wright, Will Wright, which you spoke of, I will ask you where that conversation occurred.

A. I don't remember.

Q. I will ask you to state again just what was said to Mr. Wright on that occasion.

A. I don't remember exactly the words, but I asked him to whom that line belonged crossing the snowsheds, and whether it was up to us to straighten the poles or to the Power Company, and he stated that the line belonged to the Power Company, and

(Testimony of Sidney M. Stone.)

it was up to him to straighten them.

Q. Is that all the conversation you had?

A. That is about all.

Q. And you don't remember at this time of anything else that you said to Mr. Wright on the occasion of the first conversation with him at Virginia City respecting this line passing over the snowsheds?

A. I don't remember at this time. It is a long time ago, it is over three years.

Q. I understand that. And at the present time you cannot recall anything else that was said?

A. At the present moment that is all I can recall.

Q. Now, I will ask you to state if you had a conversation with him on the 17th day of August, 1909, the day immediately preceding the accident.

A. I don't remember whether I did or not.

Q. I will ask you to state if you did not so testify upon the former trial?

A. I don't remember of so testifying.

Q. Now, the next conversation you had with him, as I understand it, was on the morning of the 18th, the morning of the accident? A. Yes, sir.

Q. And where did that conversation occur?

A. If I remember rightly on the corner of C. Street, right where the Agency of the Bank of California is.

Q. And who was present besides yourself and Mr. Wright?

A. I don't remember of anybody being present.

Q. Now, Mr. Stone, I will ask you to repeat again this morning what you stated yesterday was the sub-

(Testimony of Sidney M. Stone.)

stance of the conversation held on the morning of the 18th.

A. I told Mr. Wright that the wires were getting pretty low over there, that he had better go over there and fix the line, and he said he would; he said he would go over there and look at it, perhaps he would fix it that day, that he was going somewhere, I don't remember just exactly where he was going.

Q. Is that all you remember that he said to you [96] that day?

A. That is about the substance of the conversation.

Q. And that was the substance of the conversation as you remember it on that occasion? A. Yes.

Q. And at the present time and yesterday, you do not remember anything else that occurred or was said between you and Mr. Wright on the morning of the 18th of August, 1909?

A. That is about all that I remember.

Q. About all that you remember? A. Yes.

Q. Now, calling your attention, Mr. Stone, to your former testimony I will ask you to state if this question was not propounded to you, referring directly to the conversation on the morning of the 18th of August, 1909, by Judge Mack: "What did you say to him then?" To which question you answered: "I told him that my attention had been called by my electrician the night before, the night of the 17th, to the fact that the wires were getting pretty close to the top of that roof, and I told him that if he didn't have time we would fix it; he said, 'Let it alone; it is all right. I am going over there to-day, I inspected

(Testimony of Sidney M. Stone.)

the wire yesterday,' the 17th, 'and there is still three or four inches clearance, and I will probably go over there to-day.' "

A. I don't remember of stating that, those exact words.

Q. I will ask you to state if that is not the precise testimony as to what the conversation was between you and Mr. Wright on the morning of the 18th of August, 1909, upon the former trial?

A. It must be if it is in the transcript of testimony.

Q. Now, at the present time, Mr. Stone, do you remember whether the conversation contained in this record was the conversation you had with him at that time, or the conversation you have just detailed from the witness-stand was the conversation that you had with Mr. Wright?

A. Well, my memory was very much more fresh at that time than it is at the present time, Judge.

Q. And the statement in this record, if you so stated, was likely to be more nearly correct than your statement at the present time?

A. As far as the details I think it would be, yes.

Q. Mr. Stone, I will ask you to state when you last observed the wire passing over the snowsheds.

A. It was the morning of the day of the accident.

Q. Before the accident?

A. Before the accident; I don't remember exactly the day, it was several [97] days before.

Q. I will ask you to state if you did not on the former trial testify that you had observed those wires either the evening of the 16th or the evening of the

(Testimony of Sidney M. Stone.)

17th of August, 1909?

A. I don't remember so testifying.

Q. And I will ask you also if upon that occasion you did not testify that the wires at that time were a foot above the crest of the roof?

A. I don't remember the exact words of my testimony the last trial.

Q. Do you remember of having seen the wires about the 16th or 17th?

A. Yes,—well, several days before, I don't remember whether the 16th or 17th.

Q. The 18th the accident occurred.

A. Yes, I remember that very distinctly.

Q. And I am asking you now specifically if you did not see those wires on the evening of the 16th or 17th of August, 1909? A. It may have been the 16th.

Q. And I will ask you if at that time you did not observe the wires were a foot above the crest of the roof, and so testify upon the former trial of this case?

A. I don't remember so testifying.

Q. Do you know whether you did or did not testify at that time to that effect?

A. I testified at that time, but just exactly what I said I don't remember, Judge.

Q. Calling your attention to this, Mr. Stone, I will ask you to state if upon your direct examination on the former trial of this case, the following question was propounded to you: "When you made the first, second and third complaints to Mr. Wright, what was the condition of the wire relative to the top of the shed?"

(Testimony of Sidney M. Stone.)

A. If I remember rightly, the first time I spoke to him about it, the wire had between 18 and 24 inches clearance; the second time about a foot; I don't remember exactly because it was not measured, but I should judge that, just glancing from the ground up to the roof.

Q. Simply from the eye?

A. And the third time when it was reported to me that the wire was sagging, I did not see it, because at that time it was reported on the night of August the 17th, I saw Mr. Wright the morning of the 18th, and from there went back immediately to our plant, which is in another portion of the district." Now, I will ask you if that is not your testimony upon the former trial of this case with respect to the relative position of the wires at the times indicated by you in your examination when you saw the wires over the shed? A. It must have been. [98]

Q. And I will ask you if the time you refer to was not subsequently fixed by you as being either the evening of the 16th or 17th, when you phoned Mr. Wright?

A. That must be so if it is in the transcript.

Q. So, either on the evening of the 16th or 17th, the last time you saw it, the wire was a foot above the crest of the roof, the lowest wire?

A. Was that a question, Judge?

Q. Yes.

A. To the best of my recollection.

Q. That is the best of your recollection at the present time? A. Yes.

(Testimony of Sidney M. Stone.)

Q. And on the morning of the 18th you did not see the wire before you had met Mr. Wright in front of the Agency of some bank in Virginia City and talked with him about the matter?

A. I had not seen it that morning.

Q. Now, since refreshing your memory from your testimony before, Mr. Stone, I will ask you to state if you now have a recollection of the conversation which you testified to before, in which Mr. Wright stated to you that he had been over there the night before and that there was no danger existing at that time.

A. As far as I can recollect that was substantially correct.

Q. And that was Mr. Wright's statement to you as you now recollect, having your memory refreshed from the record of the former trial?

A. As a matter of fact, I don't recollect it.

Q. Do you know whether you recollected it when you testified upon the former trial of this case?

A. I think my recollection would have been correct about that time.

Q. You think it would have been correct at that time? A. Yes.

Q. Now, Mr. Stone, I will ask you to state when it was, if you remember, that the metallic snowshed was constructed by the Butters Company, Limited, of London, from the Chollar-Potosi tunnel upon that hill.

A. Prior to my connection with the company.

Q. It was before your connection with the com-

(Testimony of Sidney M. Stone.)

pany? A. Yes, sir.

Mr. MASSEY.—I believe that is all. [99]

[Testimony of A. S. Benner in His Own Behalf.]

A. S. BENNER, the plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. HEER.

Q. What is your first name, please?

A. Anson S. Benner.

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. And the father of Clarence Benner, deceased?

A. Yes.

Q. How old are you? A. How old am I?

Q. Yes. A. 64 my last birthday.

Q. Where do you reside? A. Virginia City.

Q. How long have you resided there?

A. 40 odd years; I think 47 years.

Q. Were you residing there at the time of Clarence Benner's death? A. I was.

Q. Where in Virginia City?

A. No. 24 G Street.

Q. Where was Clarence residing at the time of his death? A. He had his home with me.

Q. Had you any other children besides Clarence?

Mr. MASSEY.—I desire, if the Court please, to object to this question because the testimony is irrelevant and incompetent, and not within any issue in this case, and because it is absolutely immaterial, incompetent and irrelevant whether or not Clarence J. Benner had any brothers or sisters or not, as under

(Testimony of A. S. Benner.)

the law in this State and the pleadings in this case, the brothers and sisters are not and could not be beneficiaries to any extent, so far as any pecuniary damages are concerned. Objection overruled.

Mr. MASSEY.—I desire an exception for the reason stated in the objection.

(The reporter reads the question.)

A. I have.

Q. How many?

Mr. MASSEY.—I ask the Court and counsel to consider the same objection has been interposed to all these questions respecting the other children, who they are and their conditions, without repeating my objection.

The COURT.—It will be the same objection to each question, the same ruling and the same exception.

A. Four living.

Mr. HEER.—How many were there living at the time of the death of Clarence? A. Four.

Q. What were their names? A. C. E. Benner.

Q. Son or daughter? A. Son.

Q. What is the name in full?

A. Charles Edward Benner.

Q. The next. A. Mrs. Charles Bogel.

Q. The next. A. George Benner, George C.

Q. And the next. A. William.

Q. Are those children still living? A. They are.

Q. What is Charles E. Benner's age?

A. I think he is thirty-five.

Q. By what name is he ordinarily known or called?

A. Ed.

(Testimony of A. S. Benner.)

Q. What did you say his age was?

A. Thirty-five. [100]

Q. At the present time? A. I think he is.

Q. What is the age of Mrs. Bogel at this time?

A. Either 27 or 28, over 27 I think it is.

Q. When was she 27? A. Her last birthday.

Q. What month was that?

A. I think it is July, I could not say, I am pretty sure she was.

Q. What is the age of George Benner?

A. I think he was 24 his last birthday.

Q. When was that?

A. I think his is in July, I could not say sure.

Q. What is Will Benner's age now?

A. I think he is going on 23.

Q. In what month was he born?

A. I think it is November.

Q. Was Clarence ever married? A. No, sir.

Q. Where was Clarence Benner residing at the time of his death?

A. He was residing at home with me.

Q. Who else was residing at that place?

A. George and Will.

Q. Anybody else? A. Nobody else.

Q. That makes four residing there?

A. Yes, sir.

Q. Where was Mrs. Bogel residing at that time?

A. She was living about two blocks south on the same street.

Q. Do you know what Clarence was earning at the time of his death? A. I do.

(Testimony of A. S. Benner.)

Mr. MASSEY.—That is not disputed, if your Honor please, that he was getting \$4 a day.

Mr. HEER.—Nor is it disputed either that he was working as a miner?

Mr. MASSEY.—It is not disputed that he was working as a miner.

Mr. HEER.—(Q.) How long before his death had Clarence been working as a miner?

Mr. MASSEY.—There is no averment as to how long.

Mr. HEER.—The allegation of the complaint is a long time prior to his death, it is an indefinite time, and I think I have a right to make it definite, and fix it; it goes to the question of his earning capacity.

The COURT.—I will allow the question.

(The reporter reads the question.)

A. About 16 months.

Mr. HEER.—(Q.) Mr. Benner, who paid the expenses of the home in Virginia City in which yourself and the three children you have named were living at the time of Clarence's death?

Mr. MASSEY.—Object, if your Honor please, as to who paid the expenses of the maintenance of the home in which the witness lived during the time or at the time of Clarence Benner's death, for the reason that the same is incompetent, irrelevant and immaterial, the witness himself is not a beneficiary, and could not be a beneficiary of the estate, or any estate coming to the administrator of Clarence Benner, deceased, on account of this action, and [101] therefor it is immaterial so far as he is concerned;

(Testimony of A. S. Benner.)

and it is further immaterial, if your Honor please, for the reason that the brothers and sisters, or brothers who were then living at the home of the witness at the time of the death of the said Clarence Benner, are not beneficiaries, and could not be beneficiaries of any estate which he may have left; and as a basis for the measurement of any damages which may be sustained of a pecuniary character in this action, it is purely speculative, and so speculative and remote that the evidence is not competent for any purpose whatsoever.

The COURT.—I just want to know what position you take with reference to that matter, Mr. Heer.

Mr. HEER.—I take this position only, if the Court please, that the contributions that may have been made or were being made by the deceased at the time of his death to brothers and sisters, is an element to be taken into consideration in fixing the element of damages; it goes to the measure of damages; and by this question I expect to prove indirectly a part of those contributions.

The COURT.—Then it is offered only for that purpose?

Mr. HEER.—Only for that purpose, that is, to establish the measure.

The COURT.—It will be admitted.

Mr. MASSEY.—I desire an exception for the reason stated in my objection. As I understand, it is not offered as to the rights of the witness on the stand at all, as a beneficiary or otherwise?

(Testimony of A. S. Benner.)

Mr. HEER.—Not for that purpose at all.

Mr. MASSEY.—And you are not claiming that he is a beneficiary?

Mr. HEER.—I do not. Please read the question.
(The reporter reads the question.)

A. George and Clarence.

Q. Can you tell us, Mr. Benner, how much Clarence contributed towards the expenses of that household, we will say in the next month preceding his death, if he contributed anything?

A. Who, Clarence?

Q. Clarence. A. The month before his death?

Q. Yes. A. Well, between \$40 and \$50.

Mr. MASSEY.—It is assumed, if your Honor please, that the last objection may be taken to the last question propounded, as I don't care to burden the record by repeating it, and I don't want to be deemed to have waived it by remaining silent.

The COURT.—No.

Mr. HEER.—(Q.) Mr. Benner, what were the total expenses of the household during the month next preceding the death of Clarence Benner, the total expenses?

A. The total expenses? [102]

Mr. MASSEY.—I desire to interpose the further and additional objection to the one heretofore made, it is not shown that the witness knows what the expenses of the household were.

The COURT.—I presume he will answer that and say that he don't know if he does not. It takes so much time to ask do you know, and then what is it.

(Testimony of A. S. Benner.)

If you have a real point in it, I will make the ruling.

Mr. MASSEY.—So far as that latter objection is concerned, I withdraw it. As to whether or not he knows, I will reserve the right to cross-examine the witness on that proposition myself.

(The reporter reads the question.)

A. Between \$80 and \$90.

Mr. HEER.—(Q.) Mr. Benner, had Clarence before that month contributed anything to the support of the household? I have examined now only as to the last month before his death; I will ask you as to other months preceding the month in question.

A. Every month.

Q. For how long before his death?

A. For nearly four years.

Q. During the last year before his death, Mr. Benner, how much per month did he contribute to the household?

A. Just the same, or thereabouts, every month.

Q. The same as what?

A. As he contributed the last month.

Q. Mr. Benner, did you during the last year of Clarence's life know how much he was earning?

A. I do.

Q. You do now? A. I do.

Q. Did you at that time know how much he was earning? A. At the time of his death?

Q. During the last year before his death, did you know at the time how much he was earning?

A. I don't understand the question.

Q. Did you know during the last year of Clar-

(Testimony of A. S. Benner.)

ence's life how much he was earning by the day?

A. I do.

Q. Not now, I don't ask you whether you know it now, but did you at that time know it?

A. Did I know it at that time?

Q. Yes. A. I did.

Q. Did you know what Clarence was doing with the balance of his earnings, over and above the amount you have said he contributed to that household? A. I did.

Q. Did you receive them?

Mr. MASSEY.—I insist, if the Court please, it is asking leading questions right along on direct examination.

Mr. HEER.—I withdraw the question.

Q. Did you or did you not receive the excess over \$40, the sum he was contributing, \$40 or \$50?

A. I did not.

Q. Did you know what he was doing with the excess? A. I did.

Q. During the last year prior to his death, Mr. Benner, did you exercise any control over the goings and [103] comings of your son Clarence, direct or command them?

Mr. MASSEY.—I desire to object to that because it is a leading and direct question, and calls also for the conclusion of the witness.

Mr. HEER.—I withdraw the question. (Q.) Outside of the working hours of Clarence, during the last year of his life, Mr. Benner, do you know whether or not anybody exercised any control or

(Testimony of A. S. Benner.)

directions over the goings or comings of Clarence Benner?

Mr. MASSEY.—I desire to object to that because it is absolutely incompetent, irrelevant and immaterial for any purpose whatever, as to whether anybody exercised any control over him. Whether or not anybody exercised control over him is a conclusion that the Court and jury in this case must ultimately determine from all the facts and relations sustained between these parties.

The COURT.—If I recollect the question, it calls for a categorical answer, yes or no, whether he knows, and then I assume it will be followed up by asking the facts. The objection will be overruled.

Mr. MASSEY.—I desire an exception, if *the* Honor please, for the reasons stated in my objection.

The COURT.—Of course the facts should be drawn out; his mere conclusion as to whether he exercised control or did not exercise control is a conclusion, and the jury ought to be possessed of the facts from which they can deduce the conclusion as to whether he was emancipated or not.

(The reporter reads the question.)

A. I do not.

Q. That is, you don't know?

A. No. I don't know whether I understood the question right.

(The reporter reads the question.)

A. I do not.

(Testimony of A. S. Benner.)

Q. Did you direct or not, where he might go or might not go?

Mr. MASSEY.—I desire to object to that, if the Court please, because it calls for the conclusion of the witness upon a matter that the Court must determine from the facts; and for the further reason it is direct and leading, and does not call for any facts upon which the Court can base a conclusion, or the jury a conclusion.

The COURT.—I shall overrule the objection to this extent, if you will eliminate the feature that is objected to, or rather the leading character of that question, I will permit it.

Mr. HEER.—I withdraw the question.

Q. Mr. Benner, during the last year of Clarence's life, what, if anything, did you do towards directing the movements [104] or comings or goings of Clarence Benner, deceased?

Mr. MASSEY.—If the Court please, I want an objection to the question in the form it is put, not upon a matter of form this time, but a matter of law, substantive law, as well as evidence. I desire to object to the question propounded because it calls for the conduct, and acts and declarations of Clarence Benner, deceased, and of the witness, A. S. Benner, the father of Clarence J. Benner, which are not shown to have been made in the presence of the defendant, and of which there is no pretense that the defendant either had notice or knowledge thereof; and as to this defendant such declarations or such conduct, is mere hearsay testimony, not

(Testimony of A. S. Benner.)

binding upon the defendant in this case, as this defendant could not know and did not know, and had no interest in any of the matters sought by the question to be proven, at the time of the conduct and statements of the witness and his said deceased son.

Objection overruled.

Mr. MASSEY.—I desire an exception for the reasons stated in my objection.

A. He was working every day, and I would get up and get the breakfast, and he would go to work, and come home, and if he was going out he would tell me where he was going, and what time he would be coming in.

Q. (Mr. HEER.) Mr. Benner, at the time of Clarence's death what was his condition with reference to being a healthy man, or otherwise?

Mr. MASSEY.—It is not denied that he was a healthy man.

Mr. HEER.—I believe that is alleged, and admitted by the answer. That is all.

Cross-examination.

Mr. MASSEY.—(Q.) Mr. Benner, how large a man was Charles Edward Benner?

A. How large is he?

Q. Yes. A. Now?

Q. The last three or four years.

A. He weighs 192 pounds the last time he was weighed, I heard him say the other day.

Q. And what was he doing for a year prior to the 18th of August, 1909.

A. He was in the fire department.

(Testimony of A. S. Benner.)

Q. At Virginia City? A. At Virginia City.

Q. Is he a married man? A. He is.

Q. Where was he living?

A. Living on C Street.

Q. He was not living in your family at all?

A. No, sir.

Q. How long before Clarence's death was Ed. Benner married?

A. If I recollect, Ed. Benner was married [105] in 1904, May, 1904.

Q. Five years or more before Clarence's death. And during all that period was he employed in the city fire department of Virginia City?

A. No, sir.

Q. What was his employment before?

A. Miner.

Q. He had been constantly mining and living apart and separate from you from the time of his marriage up to the time of Clarence's death?

A. Yes, sir.

Q. Keeping his own household and looking after his own family? A. Yes, sir.

Q. Now, Mr. Benner, I will ask you how large a man George Benner is and was at the time of Clarence's death?

A. At the time of Clarence's death?

Q. Yes.

A. Well, I guess he weighed about 140 odd pounds.

Q. And I will ask you to state what his employment was at the time of Clarence's death.

(Testimony of A. S. Benner.)

A. At the time of Clarence's death?

Q. Yes?

A. He was working for the Charles Butters Company at the tramway.

Q. I will ask you to state how long he had been working before Clarence's death.

A. Several years. You mean for the Butters Company?

Q. No, for any company, other companies as well as the Butters Company.

A. He had been working for four years steady.

Q. And he had been continuously working during that period? A. Yes.

Q. And he was married at that time?

A. He was.

Q. And had never left your roof, your home?

A. Never.

Q. And Clarence at that time had never left your roof or home? A. No.

Q. I will ask you to state, Mr. Benner, if prior to Clarence's death in 1909, George Benner had been continuously living in your household, at your home, and had always made your house his home.

A. He had.

Q. Now, coming to William Benner, I will ask you to state how large a man he was on the 18th day of August, 1909.

A. I don't think at that time he weighed more than 115 pounds.

Q. He was at that time how old?

A. He was between 20 and 21.

(Testimony of A. S. Benner.)

Q. He was not of age at the time that Clarence was killed? A. No, sir.

Q. And prior to that time I will ask you to state what employment, if any, William Benner had.

A. Well, he was working off and on on the Virginia and Truckee Railroad, learning to be a fireman.

Q. He was a fireman on the Virginia and Truckee Railroad intermittently? A. Intermittently.

Q. He was what you call an apprentice fireman?

A. Yes.

Q. And he was earning wages? A. Yes.

Q. And was collecting [106] his wages at that time? A. Yes.

Q. You were not collecting his wages? A. No.

Q. And he was using his wages without consulting you?

A. Well, his wages didn't amount to much.

Q. Well, I am speaking about what he did; he was using them without consulting you?

A. Oh, he bought his own clothes and what he wanted when he had a payday that amounted to anything.

Q. And whatever wages he had he did not turn over to you?

A. Oh, yes, once in a while he gave me money.

Q. Once in a while he gave you money as Clarence did, towards the household expenses?

A. Oh, no, not monthly.

Q. He didn't earn monthly wages like Clarence?

(Testimony of A. S. Benner.)

A. Probably for two or three months not be at work at all.

Q. I am speaking of when he did earn money, he turned it over to you as Clarence did to help pay the household expenses? A. Very little.

Q. Well, he did turn some over, didn't he?

A. Well, he might \$15 in two years.

Q. And you let him have all the balance of the money? A. How much did he earn in two years?

Q. I am not asking you how much he earned in two years. Whatever he did earn you permitted him to take and keep, didn't you?

A. To buy his clothes.

Q. Where is he living at the present time?

A. In Reno.

Q. I ask you to state whether he is a single or a married man. A. Married man.

Q. I will ask you to state how long he has been a married man. A. A year last May.

Q. And he has a home there?

A. He has a home where?

Q. In Reno? A. Not that I know of.

Q. He is living there?

A. Been down there for a few weeks.

Q. I am asking you where his home is?

A. Well, I believe his wife is in Reno now, and he is in Carson, and he was working in Virginia awhile ago.

Q. I ask you again where William Benner's home is at the present time and has been since his marriage? A. I think it is in Reno now.

(Testimony of A. S. Benner.)

Q. Well, where has he made his home since his marriage in May, 1911?

A. In Virginia City up to the last six weeks.

Q. And where did he keep his wife during that time? A. In Virginia City.

Q. And what has been his employment during that time?

A. A miner, he has been mining.

Q. And where was his home with his wife during that time?

A. Down on N Street, I think it was.

Q. And when he got married he left your roof-tree? A. What?

Q. When he got married he left your home?

A. They [107] generally all do.

Q. And he has had a separate home ever since last May, not been living with you? A. No.

Q. And has been living separate and apart, and maintaining a family separate and apart from you?

A. Yes, sir.

Q. Now, Mr. Benner, I will ask you whether or not you are married or single.

A. Married the second time.

Q. When were you married?

A. When was I married?

Q. Yes, the last time? A. In 1909.

Q. What time in 1909 were you married?

A. Judge, has that got anything to do with the case?

The COURT.—I think you may as well answer the question, if there is no objection made.

(Testimony of A. S. Benner.)

Mr. BROWN.—We are making no objection.

A. I was married on the 31st of August, but before that I was to be married on Wednesday the 19th of August, and before Clarence was killed, I told Clarence that morning when he was going to work—

Mr. MASSEY.—You need not tell what you told Clarence, I am only asking for the date of your marriage.

A. I told him I was going to Reno the next day to be married.

Mr. MASSEY.—I ask that be stricken out.

WITNESS.—I would like to explain.

The COURT.—It is not necessary at the present time.

Mr. MASSEY.—I will ask you to state if Clarence Benner did not contribute as you speak of, or furnish for the expenses of your household for four years or more before his death about the same amount of money that he furnished the last year you have testified to.

A. I don't understand the question.

Q. Did Clarence Benner only furnish money for the household during the last year of his life?

A. No, from the day that he started work.

Q. From the day he started in to work, and he brought the money and gave it to you?

A. He did.

Q. And that continued under the same condition up to the day of his death? A. It did.

Q. And he was still a minor when he died?

A. He was.

(Testimony of A. S. Benner.)

Q. And I ask you to state, Mr. Benner, if that is not true also of your son George Benner, if long years before he reached majority, he did not just the same as after he reached his majority, brings his earnings to you for the purpose of assisting you in paying your household expenses?

A. He generally paid the grocery bill.

Q. And he gave you the money and brought it to you? A. Not his whole month's wages, no.

Q. Not all of it, but he gave you whatever was necessary, and whatever you demanded of him?
[108]

A. I never made no demands in that way.

Q. It was not necessary to make any demands, was it? A. No.

Q. And it was not necessary to make any demands of Clarence? A. Not a bit.

Q. And you say the last year of his life you would get up and get his breakfast, and is not that true before the last year of his life also?

A. How is that?

Q. I say is not the same fact true of the time prior to the last year of his life, that you would get up and get his breakfast? A. Yes, sir.

Q. And then he would go to work? A. Yes, sir.

Q. And then he would come back from work, and if he was going out he would tell you where he was going? A. Generally.

Q. And tell you when he was coming back?

A. Whether he was going to be in early or whether he was going to be late; if he was going to

(Testimony of A. S. Benner.)

a dance it would be later.

Q. I will ask you if that same condition of affairs had not existed all the time from the time that he commenced to work four years before his death up to the time of his death? A. It did.

Q. And there was no change in those conditions?

A. Well, he got better wages,

Q. I am speaking of the relations with him; your relations were just the same? A. Just the same.

Q. And no change in them from the time when he started in as a 15 or 16-year old boy up to the time of his death? A. None whatever.

Q. Did C. E. Benner contribute before his marriage to the household expenses. A. He did.

Q. The same that Clarence did? A Yes, sir.

Q. And when he was a minor he contributed that way? A. He did.

Q. And after he reached majority and moved off, and had his own household, he ceased to contribute?

A. To be sure.

Q. And since William Benner's marriage a year ago last May, has he contributed anything to your household expenses? A. He has not.

Q. And he has not offered to contribute anything since he was married and established a home of his own? A. No, sir.

Q. And George Benner is still living at your house, as I understand?

A. I have rented him one of my houses.

Q. You have rented him one of your houses?

A. Yes.

(Testimony of A. S. Benner.)

Q. And he is not living in your household now?

A. No, sir.

Q. When did he cease to live in your household as a member of your family?

A. When he got married.

Q. What time was that?

A. I think it was about a year and a half.

Q. A year and a half ago, before the first [109] trial of this case, in March last, a year ago?

A. Yes, sir.

Q. And since he got married I will ask you to state whether or not he has contributed anything toward the support of your household.

A. No, sir.

Q. He has maintained his own family?

A. Yes.

Q. And has not sought to maintain your family, or contribute anything to your family?

A. No, sir.

Mr. MASSEY.—That is all.

[**Testimony of William H. Benner, for Plaintiff.**]

WILLIAM H. BENNER, a witness called on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. HEER.

Q. What is your full name?

A. William Henry Benner.

Q. How old are you?

A. Be 24 years old the 2d day of December.

Q. What relation were you to Clarence J. Benner, deceased? A. Brother.

(Testimony of William H. Benner.)

Q. Where were you living at the time of his death? A. Virginia City.

Q. Where in Virginia City?

A. My father's home.

Q. Where was Clarence living at that time?

A. Father's home.

Q. Same place? A. Yes, sir.

Q. Who else was living at that time at that home?

A. One brother and my father; Clarence, my father, George and myself, four of us.

Q. How long had four of you been living there together? A. All our lives since my mother died.

Q. When did your mother die? A. 1904.

Q. Mr. Benner, during the last year preceding Clarence's death, by whom were your living and personal expenses paid?

A. By my brother Clarence.

Mr. MASSEY.—Of course, if your Honor please, I understand my objection to all this testimony is the same, I am not waiving that original objection I made.

The COURT.—Very well, it will be so understood, though, of course, if it is an error, the error is committed already very effectually.

Mr. HEER.—(Q.) Who furnished you your clothing during that time?

A. My brother Clarence.

Q. Where did you take your meals during that time? A. My father's home.

Q. How did Clarence pay your personal expenses?

A. Well, he bought my clothes, shoes and under-

(Testimony of William H. Benner.)

clothes, he bought me no outside clothes at all, just shoes, underclothes and so forth.

Q. Anything else? A. Gave me money besides.

Q. How much money?

A. About \$10 or \$15 a month.

Q. During what time was that, and for how long a time? A. The year before his death. [110]

Q. How much in clothing did he during that time furnish you?

A. I could not say; I went to the clothing store and got them, and had them charged in his name.

Q. Can you tell us what they amounted to in that year?

A. No, I could not just exactly state what they would come to.

Q. Well, as nearly as you can.

A. About \$40 or \$50.

Q. During the year? A. Yes, sir.

Mr. HEER.—That is all.

Cross-examination.

Mr. MASSEY.—(Q.) How old are you now, Mr. Benner?

A. Be 24 years old the 2d day of December.

Q. You were living at your father's house during the year preceding Clarence's death?

A. Yes, sir.

Q. How much did you contribute to the household expenses during the year preceding your brother's death? A. Very little.

Q. I will ask you if it was not \$100?

A. Along about there.

(Testimony of William H. Benner.)

Q. And you were a minor at that time?

A. No, sir.

Q. What was your age at that time?

A. Going on 21 years old.

Q. Going on 21? A. Yes.

Q. When did you become 21 years old?

A. 2d day of December, 1909.

Q. 2d day of December, 1909? A. Yes, sir.

Q. Well, if Clarence died in August, 1909, you were still a minor at the time of his death, were you not? A. Yes, sir.

Mr. BROWN.—The witness misunderstood your question, “minor” or “miner”?

Mr. MASSEY.—“Minor.” And during your minority when you were still under age, the year preceding your brother’s death, you contributed \$100 to the household expenses of your father?

A. Yes, sir.

Q. And so testified before? A. Yes, sir.

Q. And how much money in excess of the \$100 did you earn the year before your brother’s death?

A. Probably \$200.

Q. That would be \$300 that you earned during that year?

A. No, sir, about \$200, counting that \$100 that I gave father.

Q. Counting the \$100 that you gave your father?

A. Yes, sir.

Q. Now, sir, I will ask you to state what you did with the \$100 you earned in excess of that that you contributed to your father?

(Testimony of William H. Benner.)

A. Pocket money, spending.

Q. Pocket money? A. Yes.

Q. Did you buy any clothing with it?

A. I bought my outside clothing with it, yes.

Q. You bought your overclothing yourself with that money? A. Yes.

Q. As a matter of fact, the only clothing Clarence purchased for you was [111] your underclothing?

A. And shoes.

Q. And shoes? A. Yes.

Q. And how much money in addition to that did you say he gave you each month?

A. \$10 or \$15.

Q. \$10 or \$15? A. Yes, sir.

Q. Every month he gave you from \$10 to \$15 from his wages for spending money, in addition to clothing?

A. That is, when I was not working and needed it.

Q. When you were not working and needed it?

A. Yes.

Q. And you were then learning the occupation of fireman on the road? A. Yes, sir.

Q. And you did not have constant employment?

A. No, sir.

Q. And it was because you did not have constant employment that Clarence Benner was helping you out, is that correct?

A. Yes, sir. Well, I was working to try to get the steady run on that road, which they agreed to give me.

Q. They agreed to but didn't? A. No, sir.

Q. And when you didn't have steady work Clar-

(Testimony of William H. Benner.)

ence helped you? A. Yes.

Q. And that was the reason he was helping you?

A. Yes.

Q. And since your brother's death you have married?

Mr. HEER.—Object to the question, if the Court please, whatever may have occurred since that time, some of the witnesses have been permitted to go into, but I think it has no bearing on this case, therefore I shall object to anything which occurred after the death, and specifically to this question.

The COURT.—I will sustain the objection. I am excluding that simply because it is something which occurred subsequent to the death of Mr. Benner, and that is the only reason. It is simply the conditions as they existed at that time, and what Mr. Benner might judge he ought to give and probably would give in the future. I am simply making this as a *pro forma* ruling, and may change it later, but you have the testimony in, and it makes no difference whether you except or not.

Mr. MASSEY.—That is true, in Mr. Benner's testimony, and I do not know that I care to except to the ruling of the Court, unless there is a motion to strike Mr. Benner's testimony out.

Mr. HEER.—No, I shall not do that. I simply made the objection to shorten the time. I shall not move to strike that testimony.

Mr. MASSEY.—I have no further questions to propound. [112]

(A recess is taken at this time until 1:30 P. M.)

Afternoon Session.

[**Testimony of Mrs. Charles Bogel, for Plaintiff.**]

Mrs. CHARLES BOGEL, a witness called on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. HEER.

Q. What is your full name?

A. Mrs. Charles Bogel.

Q. How old are you, Mrs. Bogel?

A. Twenty-seven past.

Q. Where do you reside? A. In Virginia.

Q. In Virginia City, Nevada? A. Yes, sir.

Q. What relation, if any, were you to Clarence J. Benner, deceased? A. A sister.

Q. Where were you living at the time of the death of Mr. Benner? A. Virginia City.

Q. How long prior to that time had you resided there? A. All the time.

Q. All of your life? A. Yes, sir.

Q. Mrs. Bogel, during the year preceding Clarence's death, did anyone else than your husband contribute anything in money or property to your support?

Mr. MASSEY.—I desire, if your Honor please, that the same objection heretofore interposed to the question and testimony sought to be elicited may be deemed to have been taken, without burdening the record or tiring the Court in specifically presenting it at this time.

The COURT.—Very well. You may answer the question.

(Testimony of Mrs. Chas. Bogel.)

A. Clarence did.

Mr. HEER.—(Q.) What did Clarence contribute during that time, Mrs. Bogel?

A. Clothes and money.

Q. How much in money, Mrs. Bogel?

A. About \$15.

Q. \$15 in what length of time?

A. About six years altogether, up to the time that Clarence got killed.

Q. Do you mean \$15 altogether in the full six years time? A. No, every month.

Q. About \$15 during each month? A. Yes, sir.

Q. And how much in clothing that you speak of?

A. Well, I could not tell exactly how much it was.

Q. Well, let us take the last year before his death, tell us how much during that time?

A. You mean the last year?

Q. In the year's time before his death, yes.

A. It was between \$18 and \$28 each month.

Q. Was that the clothing alone, or did that include the money? A. That is clothing alone.

Q. Outside of the money? A. The money.

Q. How long before his death, Mrs. Bogel, had that been going on? A. Five years.

Q. Were the contributions before the last year more or [113] less than during the last year?

A. Well, the last year it was more.

Q. The last year it was more? A. Yes, sir.

Mr. HEER.—That is all.

Cross-examination.

Mr. MASSEY.—(Q.) Was Clarence employed con-

(Testimony of Mrs. Chas. Bogel.)

tinuously during the six years immediately preceding his death? A. Yes, sir.

Q. Where? A. I don't know what he means.

The COURT.—Where was Clarence employed, where did he work?

A. He worked for the Butters Company at the Chollar, and the butcher-shop in Virginia all that time.

Q. And what was he doing in the butcher-shop?

A. He was a butcher.

Q. He was a butcher? A. Yes, sir.

Q. He did not drive the delivery wagon?

A. He did both, cut the meat and drive the delivery wagon.

Q. Whose butcher-shop was he at work in?

A. Biegler's.

Q. How long did he work there, Madam?

A. He was a year there.

Q. When did he work there?

A. Just a short time before he went to the Chollar Company; I don't know how long he worked for the Chollar Company.

Q. Do you mean the Butters Company or the Chollar Company?

A. Well, it was the Butters Company.

Q. Do you know how long he worked for the Butters Company? A. Pretty near a year, 14 months.

Q. He worked a year in the butcher-shop and 14 months for the Butters Company? A. Yes, sir.

Q. For who else did he work during the six years you speak of? A. Peddled papers.

(Testimony of Mrs. Chas. Bogel.)

Q. Peddled papers, was a newsboy? A. Yes.

Q. Who else did he work for during that time?

A. I don't know, after he worked for Biegler's he worked at Jones butcher-shop.

Q. How long did he work at Jones butcher-shop?

A. Between four and six months.

Q. Mrs. Bogel, as I understand it, he let you have every month during that period of time \$15 a month in money? A. Yes.

Q. And in addition to that let you have from \$18 to \$28 a month in the way of clothing and supplies?

A. Yes.

Q. During each month of the entire period you have mentioned? A. Yes.

Q. When were you married, Mrs. Bogel?

A. 1904.

Q. And where were you living prior to his death, after your marriage?

A. I have been in Virginia City.

Q. At what building?

A. At Mrs. Mouser's building. [114]

Q. With whom were you living during that period?

A. At the time of his death?

Q. Prior to the time of his death, and from the time of your marriage up to his death?

A. I have been different places in Virginia, rented houses.

Q. I ask you with whom were you living after you were married? A. My husband.

Q. And you and your husband were living together, and continued to live together up to the time

(Testimony of Mrs. Chas. Bogel.)

of his death? A. Yes.

Q. You were not living in the house of your father, Mr. Benner? A. No, sir.

Q. You left there when you were married?

A. Yes, sir.

Q. And lived separate and apart from your father and his family? A. Yes, sir.

Q. Your husband was living at the time of Clarence J. Benner's death? A. Yes, sir.

Q. And is still living? A. Yes, sir.

Mr. MASSEY.—That is all.

Mr. HEER.—May it please the Court, that is all of our witnesses. I desire now to offer in evidence, and read into the record and to the jury, the American Experience Table of Mortality, or so much thereof as has a bearing upon the expectancy of life of Clarence Benner, and the one brother to whom he was contributing, and the sister. I understand under the law, it is not necessary to prove these tables, that the Court takes judicial notice of them, and I have the table printed in Johnson's Universal Encyclopaedia.

Mr. MASSEY.—If the Court please, I shall most strenuously object to any book being read into this record, that this defendant had nothing to do with its making, or knowledge of its making. If the Court takes judicial notice of what the mortuary tables are, and what the probabilities or possibilities of life are, there is no necessity of reading any encyclopaedia or treatise into the record; and I shall

object to it as incompetent, irrelevant and immaterial, for the reasons I have stated heretofore as to that objection.

The COURT.—(After argument.) Well, it will be admitted, and you may state your objection, Judge Massey.

Mr. MASSEY.—I desire to object first, because the proof offered is immaterial, incompetent and irrelevant, and without the issues of this case; because there is no evidence before this court as to whether or not the book from which they read [115] is a standard book, and the Court does not and cannot take judicial notice of what works are standard and what are not standard; and for the further and additional reason there must be proof so far as the tables are concerned, that they are standard before they can be competent for any purpose whatever, by a witness who knows that fact.

The COURT.—I am very much inclined to feel that is the rule, but I shall allow you to introduce the testimony. It is a formal matter, and the tables are undoubtedly admissible when their authenticity is established; I don't think there is any question about that; and if you feel perfectly safe on that point you will have a ruling in your favor, and you may read from the book.

Mr. HEER.—A part of the objection is there is no evidence that the work being read from is a standard work; if the identity of the work I am reading from is questioned, I would like to exhibit it to the Court and counsel. I state *it be* Johnson's Universal En-

cyclopaedia, taken from the State Library of this city.

Mr. MASSEY.—I am quite willing that the record shall go in in this way, but I don't believe, and I am honest in my conviction, that it is the proper way of proving the standard tables, the Carlisle of American tables, either one. I desire an exception.

The COURT.—The exception will be noted on the grounds stated.

Mr. HEER.—I read from Johnson's Revised Universal Encyclopaedia, American Experience Table.

Mr. MASSEY.—What is the date of that publication, Mr. Heer?

Mr. HEER.—The date of it is 1887. Volume 4, page 806, American Experience Table. Eliminating the ages not applicable to the facts of this case, I read as follows: "Age 18, expectation years 43.5."

Mr. MASSEY.—Whose age has that reference to?

Mr. HEER.—I understand that Clarence Benner was between 18 and 19 years of age at the time of his death.

Mr. BROWN.—The allegation of the complaint that you admit is that he was a healthy robust man of the age of about 19 years.

Mr. HEER.—(Contg.) "Age 18, expectation years, 43.5. Age 19, expectation [116] years, 42.9. Age 20, 42.2."

Mr. MASSEY.—I object to the reading of the expectation of anybody's age, except Clarence Benner's. Clarence Benner is the only one involved in this case by the pleadings, or that could be involved, and his age is alleged at about 19. I am quite willing

to stand upon my objection as to those, but if they are going to read anybody else's age, or any testimony respecting anybody else's age, I desire to make further and additional objections.

The COURT.—It seems to me the reading from the table should be confined to the ages of the individuals whose ages are in question. Read Clarence Benner's, and his brothers and sister. I will allow you to read the one which corresponds with Clarence Benner's age, the one which corresponds with his brother's age, and the one which corresponds with his sister's age.

Mr. MASSEY.—As I understand, you are now offering the table with reference to the age of some of the alleged beneficiaries in the complaint. I desire to interpose an objection, if your Honor please, to the introduction of any part of the table respecting the age or ages of any person named in the complaint, other than the deceased, Clarence J. Benner, for the reasons indicated in my objection to the introduction of that as heretofore made; and for the further and additional reason that the ages of the beneficiaries named therein, or any thereof, are absolutely immaterial, irrelevant and incompetent for any purpose whatever, and without the issues of this case, and there is no pleading indicating the ages of these beneficiaries; and there is nothing to indicate in the pleading that the age of these beneficiaries becomes material, or could be material, so far as the determination of any damages might be concerned, growing out of the alleged negligent death of Clarence J. Benner.

The COURT.—The objection will be overruled.

Mr. MASSEY.—I desire an exception for the reasons stated in my objection.

The COURT.—You may have the exception.

Mr. HEER.—The testimony shows at the time of Clarence Benner's death he was between 18 and 19 years of age. I have read the two ages, both 18 and 19. The testimony shows at the time of Clarence Benner's death, [117] Will Benner was between 20 and 21 years of age. The table for those two years is as follows (reads): "Age 20, expectation, years 42.2 years. Age 21, expectation, years 41.5." At the time of Clarence Benner's death the evidence shows that Mrs. Bogel, his sister, was between 23 and 24 years of age, from the table I read: "Age 23, 40.2 years. Age 24, expectation years 39.5." I now wish to read a like table to be found in the 20th volume of the American and English Encyclopaedia of Law, at page 885.

The COURT.—Is that the same table?

Mr. HEER.—It is practically the same table; there is a slight variation from the decimale. It is a New York statutory table, founded on the American Experience table.

Mr. MASSEY.—I object to it. If it is a standard table, the Court takes judicial knowledge, and if not the same as the standard table, one of them is wrong. I object to any New York statutory table; and I desire to interpose the same objection heretofore interposed.

The COURT.—I shall exclude that table. I have gone just as far as my judgment in the matter will

permit me to go.

Mr. HEER.—I will ask at this time that the jury be permitted to examine Plaintiff's Exhibit No. 2, being the piece of iron.

The COURT.—Very well.

(The exhibit is shown to the jury.)

Mr. MASSEY.—I want to cross-examine Mr. Woods further upon that exhibit.

**[Testimony of James G. Wood, for Plaintiff
(Recalled).]**

JAMES G. WOOD, recalled for further cross-examination.

Mr. MASSEY.—(Q.) Mr. Wood, I believe you stated that the snowshed was constructed under your supervision? A. Yes, sir.

Q. How long before the 18th of August, 1909, was it that that snowshed was constructed?

A. The winter before, or fall before.

Q. That would be in the winter of 1908 and 1909?

A. Yes.

Q. What time in the winter was it constructed?

A. Well, it was in the fall that we put it up.

Q. Do you remember the month?

A. No, I could not say, it was in the fall sometime.

Q. Now, Mr. Wood, I will ask you to state if the iron siding, corrugated iron siding, upon that building extended at any place to the ground?

A. It touched the ground in some places.

Q. It touched the ground in some places; how many places did that iron touch the ground? [118]

A. Well, not very far, because there was the wood in part of the building on the sides.

(Testimony of James G. Wood.)

Q. In how many places did the corrugated iron siding extend down as far as to touch the ground upon which it was constructed?

A. I could not tell you that.

Q. You could not tell that? A. No.

Q. Was *is* a number of places?

A. Might have been four or five corrugations, might have been more and might have been less.

Q. Now, Mr. Wood, I will ask you to state if there were any electrical wires passing through that building or under that building? A. Small light wires.

Q. How many of them were passing through there?

A. Two.

Q. And where did they lead to?

A. Led to the rock-breaker stations through the snowsheds.

Q. Where did they enter the snowsheds?

A. At the mouth of the tunnel.

Q. At the mouth of the tunnel? A. Yes.

Q. I will ask you to state if there were any connections with those wires at the mouth of the tunnel leading to the underground workings of the Chollar-Potosi Mine. A. The light wires.

Q. What power was used in the mine itself, if any power was used during that time?

A. The same voltage we used at the rock-breaker.

Q. And what was the power used for?

A. For running an engine.

Q. Where was that engine situated?

A. Situated in on the lower level.

Q. How far down?

(Testimony of James G. Wood.)

A. Above the tunnel level that we ran the car out of.

Q. What voltage or power did you use for the operation of the engine on the inside of the mine?

A. About 400, I think it was.

Q. 400 what? A. Volts.

Q. 400 horse-power? A. 400 volts.

Q. Now, I will ask you what power you used at the rock-breaker, Mr. Wood?

A. The voltage that crossed the building.

Q. How much voltage was that?

A. About the same.

Q. Now, Mr. Wood, I will ask you where you obtained the corrugated iron with which you constructed that building? A. Where was it from?

Q. Yes. A. Came from the Butters plant.

Q. Where was that situated?

A. In Six Mile Canyon or Seven Mile Canyon.

Q. What use had it been put to at the Butters plant before it was brought to the Chollar-Potosi Mine?

A. Used for siding and roof.

Q. Used for siding and roofing what?

A. A building.

Q. What building? A. Butters plant.

Q. And what was the plant used for?

A. Cyanide plant.

Q. I will ask you if any of it was used for the purpose of covering the [119] cyanide tanks.

A. It was on the building.

Q. It was on the building over the tanks?

A. Some, yes; I could not tell whether this iron

(Testimony of James G. Wood.)

came off of the mill or chutes, or where it came from.

Q. But it all had been used either at the cyanide plant or mill at Six Mile Canyon?

A. Yes, the siding and roofing.

Q. How long had it been used there?

A. A few years.

Q. Before you put it on the Chollar-Potosi snowsheds? A. Yes.

Q. I will ask you what power was used at that plant for its operation? A. At the Butters plant?

Q. Yes. A. Could not state.

Q. Never were down there? A. Yes.

Q. What kind of power did you use?

A. Electric power.

Q. I will ask you to state whether or not the electric power was greatly in excess of the power you used in the mine for the operation of the mine, whether you know that fact?

A. The same power, you mean?

Q. Yes, whether it was the same, greater or less?

A. I could not tell you because I am no electrician.

Q. You were not operating that plant?

A. Not at all.

Q. I will ask you to state if where this corrugated iron was used or any part of it, the acid or fumes arose from the cyanide plant so as to come in contact with any of the corrugated iron that you did use in your snowsheds?

A. We used the best iron we could pick out.

Q. I am not asking you if you used the best iron

(Testimony of James G. Wood.)

you could pick out, I am asking if the cyanide fumes from the cyanide plant came in contact with that, or could have come in contact with it?

A. It could have come on some, and some it could not.

Q. What part could it have come on?

A. Could have come on some of the roof.

Mr. MASSEY.—That is all.

Redirect Examination.

Mr. HEER.—(Q.) You say there was power used in this mine? A. Yes.

Q. Where did the power come from?

A. It came off the regular line.

Q. What do you mean by the regular line?

A. Where that south pole there continued right on toward the mine west, that runs up into the transformer house.

Q. You have reference to this line (indicating on map)?

A. Yes.

Q. That which appears farthest south on the map, and running nearly east and west?

A. Yes, and that power goes in the upper tunnel.

[120]

Q. That is where the power came from in the mine? A. Through the upper tunnel.

Q. Was there any power conveyed into the mine from the line running north and south?

A. Not a heavy voltage, only a lighting power system.

Q. When the iron was taken from the Butters

(Testimony of James G. Wood.)

plant to construct this passage-way what shape was it in? A. Very good.

Mr. MASSEY.—I move to strike that out as absolutely indefinite and uncertain.

Mr. HEER.—I consent, if the Court please.

Q. I don't have reference to the condition of the iron, but to the shape of the pieces of iron.

A. Some of them were 10 feet long by 26 inches wide, and some 8 foot long by 26 inches wide, about.

Q. Were they straight pieces or bent pieces?

A. They were straight, principally, corrugated.

Q. Were they bent or flat? A. They were flat.

Q. Were all of them flat?

A. Pretty much all of them.

Q. Were any of them bent into an "A" or ridge shape?

A. When we brought them up from the plant, do you mean?

Q. Yes. A. No, I don't think so.

Q. When were the pieces constituting that roof bent into the "A" shape we see here now?

A. Well, that piece there was run along the ridge of the roof like that (illustrating), if the roof was running this way. I could show you on the black-board.

Q. Were there other pieces of that kind?

A. There was other pieces running up and underneath.

Mr. MASSEY.—(Q.) Other pieces of what?

A. Running up and down the roof, and this formed a cap on top of the other corrugated iron.

(Testimony of James G. Wood.)

Mr. HEER.—I will ask that the answer be stricken out as not responsive to the question.

The COURT.—It may go out then.

Q. You testified when the pieces of iron were brought from the Butters plant in Six Mile Canyon to construct this passageway, that they were flat?

A. Yes.

Q. It appears also that the ridge of that roof was made by a piece of iron bent into an “A” shape as this is; at what time was that bent?

A. When we were putting up the building, to keep the snow from getting in.

Q. That is, when you were building the snow-sheds? A. Yes.

Mr. HEER.—That is all. [121]

Recross-examination.

Mr. MASSEY.—(Q.) I will ask you to state if some of the pieces were not bent when you took them off of the cyanide plant and mill in Six Mile Canyon?

A. That is a pretty hard question to answer.

Q. Were they all perfectly flat when you took them off there?

A. All flat when we took them off the roof, same as lying on the roof.

Q. What kind of a roof did you have *done* there?

A. Flat roof.

Q. Absolutely flat roof?

A. Some slope so water would run off.

Q. And all the pieces you took off were flat?

A. Yes.

(Testimony of James G. Wood.)

Q. And they were never bent until you took them up to the snowshed, is that your testimony?

A. We bent them up there.

Q. They were all flat when you took them up there? A. All that way, yes.

Q. And none of them were any other way?

A. I didn't see them all when they were coming up there; I could not state that.

Q. That is what I am trying to get; counsel seemed to think that was your testimony. Now, I will ask you to state if there was not iron underneath this piece from the same roof from which this was taken, corrugated iron. A. Yes.

Q. That was not removed? A. Yes.

Q. Is still there? A. Yes.

Mr. MASSEY.—That is all.

Mr. HEER.—That is all.

Plaintiff rests.

(Jury excused until Thursday, April 18th, at 10 A. M.)

Mr. MASSEY.—If the Court please, at this time I desire to announce to Court and counsel that the defendant will offer no testimony. I also at this time desire to interpose a motion for a dismissal and nonsuit for the following reasons. I will state all the reasons, but only desire to call the Court's attention to three, which I will segregate after indicating the grounds:

The first reason, because the plaintiff has not shown by the evidence that Clarence J. Benner's

death was caused by any negligent act of this defendant.

2d. Because the evidence shows that Clarence J. Benner's death was caused by his own contributory negligence.

3d. Because the evidence fails to show that Clarence J. Benner at the time of his death had been emancipated, and that either his brothers or his sister were damaged to any extent or in any amount by his death, for the reason [122] that the sums contributed by the said Clarence J. Benner, as shown by the proof, was not the property or money of Clarence J. Benner, but was the money and property of his father, A. S. Benner, and contributed, as shown by the evidence, with his permission and consent.

4th. Because the evidence fails to show that Clarence J. Benner ever contributed anything for the support of his brothers or sister, or either of them, but that any such sum contributed, as shown by the testimony, in money or otherwise, was the property of the father, A. S. Benner, and not the property of Clarence J. Benner, deceased, being the wages, as shown by the testimony, of Clarence J. Benner, a minor, which belonged at that time to the father.

5th. Because the father, A. S. Benner, of the said Clarence J. Benner, deceased, has not been damaged in any sum or to any extent by the death of Clarence J. Benner, in that under the law he is not a beneficiary of any judgment which might be recovered in this action against the defendant on account of

the said alleged wrongful death; and for the further and additional reason that he is not suing to recover in this action any loss of wages caused by the death of his said son, Clarence J. Benner, by the wrongful act or neglect of this defendant, and is not claiming any damages therefor, and is not claiming any damages in this action of any kind or character on account of the death of the said Clarence J. Benner.

6th. For the further and additional reason that under the proof and evidence, it is not shown that the brothers and sister of the said Clarence J. Benner, or either of them, have been damaged by any alleged wrongful act or negligent act of the defendant in this case. And for the further and additional reason that as alleged beneficiaries of the said Clarence J. Benner, or of any judgment that may be recovered herein, or could be recovered herein, on account of the pecuniary loss or damage, there is no evidence showing or tending to show that said brothers and sister, or either of them, could reasonably expect to receive any continued pecuniary benefit from the deceased, or any benefit whatsoever; and there is no evidence showing that the defendant was accumulating, or was likely to accumulate any estate, so that said brothers and sister, or either of them, as heirs of the said Clarence J. Benner, deceased, would suffer or could suffer any damage or loss on that account. And for the further and [123] additional reason that any attempt on the part of the jury, upon the evidence to fix any damages for the brothers and sister would be based purely upon speculation, and so remote as to furnish no basis under

the evidence, upon which to make any finding whatsoever.

7th. And for the further reason that under the pleadings in this case, in the absence of proof of the emancipation of Clarence J. Benner by his father, A. S. Benner, Mr. A. S. Benner, the father, would have a right only to recover for any earnings of Clarence J. Benner, which may have been caused by his death, which right would end upon Clarence J. Benner's arriving at his majority, and death *having shown* to have occurred before such majority, the father's right to recover would be limited only to that extent, and he is not in this action suing to recover for loss of wages, or for any damages therefor.

8th. For the further and additional reason, that it appears from the testimony in this case that the death of Clarence J. Benner was caused, and is shown by the evidence to have been caused, by the negligent act of his employer, the Charles Butters Company, Limited, in failing to furnish the said Clarence J. Benner a safe place in which to work.

(Argument.)

(Court adjourned at 3:30 P. M. until Thursday, April 18th, 1912, at 10 A. M.)

Thursday, April 18th, 1912, 10 A. M.

The COURT.—The motion that was made yesterday will be denied.

Mr. MASSEY.—At this time, if your Honor please, I desire to except to the action of the Court, for the reasons and each of the reasons specified in the motion itself:

1st. Because the evidence does not show that Clarence J. Benner's death was caused by any negligent act of the defendant.

2d. Because the evidence does show that Clarence J. Benner's death was caused by his own contributory negligence.

3d. Because the evidence fails to show that Clarence J. Benner at the time of his death had been emancipated; and that therefore his brothers and sister, or either of them, have not been damaged to any extent or in any sum.

4th. Because the evidence fails to show that C. J. Benner ever contributed anything to his brothers and sister, or either of them, but that such [124] contribution was of the wages of Clarence J. Benner belonging to his father, A. S. Benner.

5th. Because A. S. Benner, the father of said Clarence J. Benner, has not been damaged to any amount by the death of the said Clarence J. Benner, and is not entitled to recover, as shown by the complaint and issues made herein, and would not be entitled to participate in any judgment which might be recovered in this action.

6th. Because the death of Clarence J. Benner is shown to have been caused by the negligent conduct of the Charles Butters Company, Limited, his employer, in not furnishing to said plaintiff a safe place in which to work. And for all the grounds mentioned in the motion itself, and each thereof.

Thereupon, at the close of the evidence, the plaintiff requested the Court to give to the jury the following instructions:

1. Negligence consists in doing something which a reasonable person would not have done, or in failing to do that which a reasonable person would or should have done.

2. The Court instructs the jury that contributory negligence is a matter of defense. It is not presumed, but must be proved, and the burden of proving it rests upon the defendant, unless it sufficiently appears from the evidence on the part of the plaintiff.

3. The defendant alleges that Clarence J. Benner knew, or should have known, of the maintenance, position and condition of said high tension lines, or of the iron-covered passageway, and that the siding upon said passageway was also iron covered. Thus by its denials and allegations defendant raises an issue as to whether Clarence J. Benner was not himself guilty of contributory negligence. In deciding whether Benner knew or should have known of the dangerous conditions, you should consider all the circumstances and conditions, as well as his knowledge and experience. He was entitled to assume that the Truckee River General Electric Company had taken every proper precaution to insulate its wires and to protect the public from coming in contact with dangerous currents of electricity, which it might be transmitting over its lines. Benner was not bound in the exercise of that ordinary care which the law requires of him, to make any investigation as to the condition and [125] insulation of the defendant's wires, unless he was put upon inquiry by some discovery or some suggestion of

danger, which, under the circumstances, it was gross carelessness for him to neglect.

4. It is the duty of an electric company owning, maintaining and using electric wires charged with a deadly or dangerous current of electricity to furnish, as nearly as possible, perfect protection to those who may have occasion to use or be near the same.

5. The care, protection and diligence required of the owners or users of electric currents and wires charged with electricity varies with the danger which might be incurred by negligence. The greater the degree of danger, the greater the degree of care required.

6. In all cases where electric wires carry or may carry strong and dangerous currents of electricity, and the result of negligence might expose to death or serious injury any person who may be lawfully in proximity of the wires or liable to come in contact with them, a high degree of care and diligence to avoid said results is required.

7. Corporations can only act through their officers, agents and employees, within the scope and sphere of their employment. The acts of such employees, agents and officers within the scope and sphere of their employment, are, in a legal sense, the acts of the corporation, such acts as the corporation itself would do, or is empowered to do, and for which the corporation is liable.

8. The Court instructs the jury, that, if you believe from the evidence that the defendant was notified that its wires were in such condition as to be a cause of danger to those who might lawfully be

near them, and failed to take immediate steps to investigate and rectify such condition, if the same existed, and if a sufficient length of time between such notice to the defendant and the accident to plaintiff for such investigation and correction had elapsed, and thereafter, by reason of the failure of the defendant to attend to its said wire, such wire or wires, charged with electricity hung suspended over the scene of the accident so as to become dangerous to persons lawfully near the same, then the defendant would be guilty of negligence.

9. The Court instructs the jury that if they believe from the evidence, that on the 18th day of August, 1909, Clarence J. Benner came to his death [126] while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended complaint filed herein; and if the jury further believe from the evidence that the death of said Clarence J. Benner was caused by the negligence of the defendant, Truckee River General Electric Company, as charged in the declaration; and if the jury further believe from the evidence that the said Clarence J. Benner left him surviving brothers and a sister, as charged in the complaint; and that such brothers and sister, by the death of said Clarence J. Benner, have suffered pecuniary loss, then, in law, the plaintiff is entitled to recover.

10. If the jury should find for the plaintiff, the pecuniary value of the life of the deceased to his brothers and sister is to be determined by you from all the evidence in the case, and in this connection

you may consider the deceased's age, condition of health and strength at the time of his death, his capacity for earning money, his occupation, his personal habits, his wages, and all other facts in evidence; and the value is to be fixed at the present worth of the amount which it is reasonably the deceased would have contributed to his said brothers and sister in money, property or services, had he lived, during his and their expectancy of life, and of which, in view of all the evidence, they were, in your judgment, deprived by the death of Clarence J. Benner.

11. The Court instructs the jury that the total limit of damages which they may assess in this case, should they find for the plaintiff, is the sum of \$30,000.00.

Thereupon, at the close of the evidence, the defendant requested the Court to give to the jury the following instructions:

1. I instruct you to return a verdict for the defendant. If the above instruction is refused, then the defendant requests the Court to give to the jury the following instructions:

2. I instruct you that you cannot award any damages to the plaintiff in this action for any loss or injury sustained by A. S. Benner, the father of said Clarence J. Benner, deceased, on account of his death.

3. There is no evidence in this action tending to prove whether the said Clarence J. Benner, deceased, in his lifetime was in the habit of saving his money, or whether he ever accumulated any estate

[127] or property, or whether he ever contributed to the support of his brothers or sister, or either of them, or whether his said brothers or sister, or either of them, ever had any reasonable expectation of receiving aid from him. Therefore, if you find a verdict in favor of the plaintiff, you must limit the amount of damages to a merely nominal sum.

4. I instruct you that you cannot award to the plaintiff in this action exemplary damages by way of punishment or as smart money for defendant's negligence, if any, in causing the death of said Clarence J. Benner.

5. I instruct you that A. S. Benner, the father of Clarence J. Benner, deceased, is not entitled and will not be entitled, to participate in the proceeds of any judgment which may be rendered in favor of the plaintiff herein, and is not to any extent, under the facts of this case as set out in the complaint a beneficiary of any judgment obtained herein, by reason of the death of the said Clarence J. Benner. I therefore instruct you that in determining the amount of damages, if any, to which the plaintiff is entitled in this case, you will not consider any loss or damage which the said A. S. Benner, father of said deceased, has sustained by reason of the death of the said Clarence J. Benner, if you do find that his death was caused by the negligence of the defendant in this action.

6. I further instruct you in this action you cannot award the plaintiff, if you find the plaintiff is entitled to recover, any damages for grief or sorrow, or pain of mind, or injury to his feelings, or

for such grief or sorrow, or pain of mind or injury to the feelings of any of the brothers or sister of said Clarence J. Benner, deceased; neither can you award in this action, if you find that plaintiff has been damaged, any damages for any pain or suffering, or for the loss of the comfort or protection of the deceased to said plaintiff, or any of the beneficiaries therein named, on this account; neither can you award any damages to said plaintiff on account of any pain or suffering of the said deceased, caused by any act of negligence of said defendant.

7. It is alleged in the complaint and has not been denied, that the deceased was at the time that he met his death engaged as a miner in the employ of the Charles Butters Company, Limited; I therefore instruct you that it was the duty of the Charles Butters Company, Limited, to provide for said Clarence J. Benner while engaged in its employment, a safe place in which to work; and if you find [128] that the said Charles Butters Company, Limited, failed to furnish the said Clarence J. Benner a safe place to work, and that by such failure or neglect Clarence J. Benner was killed, then I instruct you that his death was caused by the negligent act of said Charles Butters Company, Limited, and you may take that matter into consideration in arriving at your verdict in this action.

8. Negligence in this case cannot be presumed by you by the mere happening of the accident.

9. Plaintiff is not entitled to a verdict on any ground of negligence not set out in his complaint; neither is he entitled to recover in this action unless

you believe from a preponderance of the evidence that the death of Clarence J. Benner was the natural and proximate result of such negligence, if any, on the part of the defendant corporation. The burden of proving his case by a preponderance of the evidence rests upon the plaintiff. A proximate cause of an event is defined as that which in the natural and continuous sequence unbroken by any new independent cause, produced that event, and without which the event could not have occurred.

10. I further instruct you that if you find for the plaintiff, in this case, then the amount to be fixed by you shall consist only of such pecuniary damages which would be the exact equivalent of the injury, if any, sustained by the brothers and sister of the deceased, as shown by all the evidence in this case, by reason of the death of said Clarence J. Benner.

11. I further instruct you that when a child is under age, the parents have a right to his earnings, and may therefore sue for the loss experienced by his death, but this right ends when he *maintains* his majority, and, if death occurs before that, a recovery is limited in consequence to his probable earnings up to that time; the chance of survivorship, his ability and willingness, after he should become of age, to support others, being too vague, as is declared, to enter into an estimate of damages merely compensatory.

12. I instruct you that Charles Ed. Benner and George C. Benner and Will Benner, and each of them, brothers of Clarence J. Benner, deceased, are not, nor is either of them, entitled, and will not be

entitled, to participate in the proceeds of any judgment which may be rendered in favor of the plaintiff herein, [129] and they are not, nor is either of them, to any extent, under the facts of this case, a beneficiary of any judgment obtained herein, by reason of the death of the said Clarence J. Benner. I therefore instruct you that in determining the amount of damages, if any, to which the plaintiff is entitled in this case, you will not consider any loss or damage which the said Charles Ed. Benner, George C. Benner and Will Benner, brothers of said deceased, have or has sustained by reason of the death of said Clarence J. Benner, if you do find that his death was caused by the negligence of the defendant in this action.

13. I further instruct you that if you find for the plaintiff in this case, then the amount to be fixed by you shall consist only of such pecuniary damages which would be the exact equivalent of the injury, if any, sustained by Mrs. Charles Bogel, sister of the deceased, as shown by all the evidence in this case by reason of the death of the said Clarence J. Benner.

At the conclusion of the argument, the Court instructed the jury as follows:

The COURT.—Gentlemen, you will now listen to the instructions. This action was brought by the plaintiff, A. S. Benner, as administrator of the estate of his son, Clarence Benner, to recover from the Truckee River General Electric Company the sum of \$30,000 damages for the death of said Clarence Benner. It is admitted that Clarence Benner

at the time of his death was in the employ of the Charles Butters Company, Limited, at an agreed compensation of \$4.00 per day. Leading from the mine in which he was working to a rock-breaker several hundred feet to the east of the mine, was an iron-covered passageway. At the time of the accident, and for many months prior thereto, the Electric Company was maintaining, and had maintained, a pole line carrying high tension wires for the distribution of electric current. This line crossed the passageway nearly at right angles. The wires were supported by poles on each side of the passageway; when these poles were in a vertical position the wires overhung the ridge or crest of the passageway some three or four feet. It is alleged in the complaint that sometime during the month of July, [130] 1909, the guy wire holding one of the poles to the south of the passage became loosened, or had been broken, and in consequence the two poles immediately to the south, thus deprived of support, under the strain of the high tension wires, were drawn and inclined toward the north to such an extent that the wires fell and rested upon the iron-covered passageway and the iron covering was charged with a deadly current of electricity.

Defendant admits that the wires rested upon the iron-covered passageway, and that the iron was charged with a deadly current of electricity but denies that this occurred until after the 18th day of August.

Plaintiff alleges that for the space of a month or thereabouts prior to the accident, defendant wil-

fully, wantonly, maliciously, carelessly and negligently allowed the poles to lean toward the north, and said high tension wires to remain in proximity to and rest upon said iron-covered passageway. Plaintiff further charges that defendant was notified of the condition of the poles and wires; that it examined them; and promised Charles Butters Company to repair them, but wholly failed to do so. Defendant admits its failure to make such repairs and to restore the two poles to a vertical position, but denies that such failure was willful, wanton, malicious, careless or negligent; admits notice that the guy wire was broken or loosened, but denies that Charles Butters Company notified it that said high tension wires were resting on the iron-covered passageway; and alleges that said notification was received by defendant's agent but a short time before the accident; admits that it examined the poles and wires immediately on receipt of such notice; declares that the high tension wires were not then resting on said iron-covered passageway; that its agent promised as soon as practicable, using all possible diligence therefor, to repair the guy wire and straighten up the poles. It is stated in the complaint that on the 18th day of August, 1909, Clarence J. Benner, without any carelessness or negligence on his part, sat down, leaned his head and shoulders against the iron covering of this passageway, and instantly received through his body a severe charge and current of electricity, whereby he was injured, and thereafter languished in great agony, and subsequently died, from the effects of the injury. It is further

stated that said defendant then and there carelessly, negligently, wilfully, [131] wantonly and maliciously allowed said charge and current of electricity from the electric plant of defendant to enter said iron covering of said passageway, and to injure said Benner, and thus caused his death.

Defendant admits that Benner came to his death as thus alleged, but denies any carelessness or negligence on its part, or that it wantonly, willfully or maliciously caused or permitted said charge of electricity to enter the iron-covered passageway, or to injure said Clarence Benner.

Defendant alleges that Clarence Benner knew, or should have known, of the maintenance, position and condition of the wire lines, and of the iron-covered passageway, and that the siding upon said passageway was also iron covered. Thus by its denials defendant raises an issue as to whether Clarence Benner was not himself guilty of contributory negligence.

In deciding whether Benner knew or should have known of the dangerous condition, you should consider all the circumstances, as well as his knowledge and experience. He was entitled to assume that the Truckee River General Electric Company had taken every proper precaution to protect the public from coming in contact with dangerous currents of electricity which it might transmit over its lines. Benner was not bound in the exercise of that ordinary care which the law requires of him, to make any investigation as to the condition of defendant's wires, unless he was put upon inquiry by some discovery

or some suggestion of danger, which, under the circumstances, it was gross carelessness for him to neglect.

The defense of contributory negligence is an affirmative defense to be established by a preponderance of the proof introduced and admitted in the case. In other words, you cannot assume that the decedent was guilty of contributory negligence; such negligence must be shown by a preponderance of the evidence, and the burden of showing it is upon the defendant. If the fact of contributory negligence is disclosed by the evidence of the plaintiff himself and by a preponderance of that proof, you are warranted in finding it to be a fact, even though defendant offers no evidence on that point. If you find that he was guilty of contributory negligence, then your verdict should be for the defendant. The important issue in this case, however, is as to whether the death of Clarence Benner was the natural and direct result of the negligence and carelessness of the [132] defendant. Corporations can only act through their officers, agents and employees. The acts of such an employee, agent or officer within the sphere of his employment, are in a general sense the acts of the corporation, such acts as the corporation itself could do, or has power to do, and for which the corporation is liable. The law did not require the defendant to absolutely insure the safety of its lines and wires. No one is held responsibly for consequences which cannot with reasonable care and diligence be foreseen and guarded against. That is, if the defendant, with the exercise of reasonable foresight

and prudence, could not have anticipated that serious consequences might follow from its failure to repair the poles, wires and guy wire, there would be no negligence. The happening of an accident is not of itself proof of negligence, but that fact, in connection with all other evidence in the case, may be considered by you in determining whether the defendant was negligent.

It is the duty of an electric company owning, maintaining and using electric wires charged with a deadly current of electricity, to furnish as nearly as possible, perfect protection to those who may have occasion to use or be near the same. The care, protection and diligence required by the owner of such wires varies with the danger which might be incurred by negligence. The greater the degree of danger, the greater the degree of care required. In all cases where electric wires carry or may carry strong and dangerous currents of electricity, and the result of negligence might expose to death or serious injury any person who may be lawfully in proximity of the wires or liable to come in contact with them, a high degree of care and diligence to avoid such results is required.

Negligence consists in doing something which a reasonable person would not have done, or in failing to do that which a reasonable person would or should have done. Negligence in this case cannot be presumed by you from the happening of the accident. If you believe from the evidence defendant was notified that its wires were in such condition as to be a cause of danger to those who might lawfully be

near them, and failed to take immediate steps to investigate and rectify such condition, if the same existed, and if a sufficient length of time between such notice to the defendant and the accident to plaintiff for such investigation and [133] correction had elapsed, and thereafter by reason of the failure of defendant to attend to its wires, such wire or wires, charged with electricity *hugh* suspended over the scene of the accident so as to become dangerous to persons lawfully near the same, then defendant would be guilty of negligence. If under these instructions you find defendant was not negligent, that would end the case. If you should find that defendant was negligent, however, it would be your duty to consider the question of damages.

Generally, there are two classes of damages which may be considered in cases of this character, pecuniary damages and exemplary damages. Pecuniary damages are the precise measure of the injury done. Exemplary damages have no special reference to the amount or the exact measure of the injury, but are imposed as punishment for the commission of a willful injury, or for wanton disregard of duty.

If you find for the plaintiff in this case the amount to be fixed by you should consist only of such pecuniary damages as would be the exact equivalent of the injury, if any, sustained by the brothers and sister of the deceased, as shown by all the evidence in this case, by reason of the death of Clarence Benner.

You cannot award to plaintiff in this action exemplary damages by way of punishment or as smart money for defendant's negligence, if any, in causing

the death of Clarence Benner.

A. S. Benner, the father of Clarence Benner, deceased, is not entitled, and will not be entitled, to participate in the proceeds of any judgment which may be rendered in favor of the plaintiff herein, and is not to any extent, under the facts of this case as set out in the complaint, a beneficiary of any judgment obtained herein, by reason of the death of Clarence Benner. I therefore instruct you that in determining the amount of damages, if any, to which the plaintiff is entitled in this case, you will not consider any loss or damage which the said A. S. Benner, father of said deceased, has sustained by reason of the death of the said Clarence J. Benner, if you do find that his death was caused by the negligence of the defendant in this action.

You cannot award the plaintiff, if you find the plaintiff is entitled to [134] recover, any damages for grief or sorrow or pain of mind, or injury to his feelings, or for such grief or sorrow, or pain of mind or injury to the feelings of any of the brothers or sister of said Clarence J. Benner, deceased; neither can you award in this action, if you find plaintiff has been damaged, any damages for any pain or suffering, or for the loss of the comfort or protection of the deceased to said plaintiff, or any of the beneficiaries therein named, on this account; neither can you award any damages to said plaintiff on account of any pain or suffering of said deceased, caused by any act of negligence of defendant.

If you believe from the evidence that on the 18th day of August, 1909, Clarence Benner came to his

death while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended complaint filed herein; and if you further believe from the evidence that the death of said Clarence Benner was caused by the negligence of the defendant, Truckee River General Electric Company, as charged in the declaration; and if you further believe from the evidence that the said Clarence J. Benner left him surviving brothers and a sister, as charged in the complaint, and that such brothers or sister, by the death of said Clarence Benner, have suffered pecuniary loss, then in law, the plaintiff is entitled to recover.

If you should find for the plaintiff, the pecuniary value of life of the deceased to his brothers and sister is to be determined by you from all the evidence in the case, and in this connection you may consider the deceased's age, condition of health and strength at the time of his death, his capacity for earning money, his occupation, his personal habits, his wages, and all other facts in evidence; and the value is to be fixed at the present worth of the amount which it is reasonably probable the deceased would have contributed to his said brothers and sister in money, property or services, had he lived, during his and their expectancy of life, and of which, in view of all the evidence, they were, in your judgment, deprived by the death of Clarence Benner.

You are the exclusive judges of the facts, of the credibility of the witnesses, and of the weight which is to be given to each statement made by each witness. Counsel may declare what is proven; the

Court may express [135] its views as to what the facts are; you, however, are to listen to such utterances, and give them such consideration, and such consideration only, as you in your judgment deem proper and reasonable as intelligent, honest men.

As to the law the rule is different. You are to follow the instructions of the Court. If the Court errs in its statement of legal principles, it is the error of the Court for which the Court alone is responsible, and not the jury.

It may be pertinent, however, for me to say here that under the common law there could be no recovery in a case of this kind; the theory was that the cause of action was in the injured party himself, and when he died his cause of action died with him. Whatever relief can be afforded in this action comes under the provisions of a statute passed by the legislature of this State. Now, whether that statute is broad enough, whether it is adequate, whether it is good or bad, whether it is the law as it ought to be, is not for us to consider. If the law is unwise, if it is too broad or too narrow, that is no concern of ours; the responsibility for that lays with the law-making body. We are here simply to execute the law as it is written, and as it is found; that duty rests upon you just as it rests upon me.

You cannot go outside or beyond the testimony. The plaintiff is not entitled to a verdict on any ground of negligence not set out in his complaint, neither is he entitled to recover in this action unless you believe from a preponderance of the evidence that the death of Clarence Benner was the natural

and proximate result of such wrongful act, neglect or default of the defendant.

By a preponderance of evidence is meant that evidence which after a consideration of all the testimony, is entitled to the greater weight; it is such evidence as, when compared with that opposed to it, has the more convincing force. The burden of proving his case by a preponderance of the evidence rests upon the plaintiff. As I have already intimated, the defendant cannot be charged with responsibility for the death of the deceased unless his death was the direct and proximate consequence and result of the negligence, default or wrongful act of the defendant. A proximate cause of an event is defined as that which in the natural and continuous sequence, [136] unbroken by any new independent cause, produced that event, and without which the event could not have occurred. A witness is entitled to the greatest weight, everything else being considered, who has the best opportunity to know and the highest degree of intelligence in seeing, understanding and weighing whatever appears before him in relation to the subject upon which he is examined. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which he testifies, by his demeanor on the witness-stand, by the character of his testimony, by his motives, or by contradictory evidence.

In judging the credibility of the respective witnesses in this case, if there is any conflict you may believe the whole or any part of the evidence of any witness, and if you believe that a witness has testi-

fied falsely, and has done so knowingly and willfully, to any material matter, you may disregard the whole or any part of his testimony as may be dictated by your best judgment, save where it is corroborated by other credible testimony.

In this connection you must remember that your power and duty to judge of the effect of the evidence is not an arbitrary one, it must always be exercised with legal discretion, and in subordination to the rules of evidence.

It takes twelve of your number to find a verdict. The Clerk has prepared two forms of verdict, and when you have retired to your jury-room you will elect a foreman; when you have agreed upon your verdict you will notify the Marshal, and you will be brought into court. I will now leave this case with you, gentlemen, and I wish to say that I do it with the utmost confidence. You have listened to this evidence very patiently and very carefully. You are to remember that you are here to find the truth, and to do that which is just and right between these parties. You are not to be swayed by sentiment; you are not to decide against one party because it is a corporation, or in favor of the other party because he is an individual. You are not to be influenced by these considerations. You are simply to give a verdict just and fair, which your own conscience will approve, and to do that which is right between man and man, and I am sure you will do it. [137]

The COURT.—Have you any exceptions to take to the instructions?

Mr. BROWN.—We have no exceptions.

Mr. MASSEY.—On behalf of the defendant, if the Court please, I desire at this time to save as a matter of record certain exceptions. I desire to except to that part of the Court's instructions defining the degree of care required by the deceased, Clarence J. Benner, under the plea of contributory negligence, in that the degree of gross carelessness as given by the Court to the jury is the lowest degree of care that is required by the law. I desire also at this time, if the Court please, to except to that part of the instructions given by the Court wherein the Court instructed the jury in effect that the damages to be ascertained under the facts of the case and the issues presented, could be determined as the present worth of the contributions of Clarence Benner, if any, made to his brothers and sister during his lifetime, for the reason that there is no evidence as to a part of the brothers that any contributions were ever at any time made by Clarence Benner during his lifetime; and for the additional reason that any contributions made by said Clarence Benner under the undisputed evidence, to William Benner, was not made as a voluntary contribution upon which there could be based any expectancy on the part of William Benner so far as he was concerned. And for the further and additional reason, if the Court please, that it is impossible to determine under the facts in this case what the present worth of any contributions is, as it involves speculation upon the part of the jury as to future conditions, which may or may not arise, and upon which there can be and was no evidence whatsoever. Those, I believe, are the

only exceptions I desire to take to the instructions of the Court upon its own motion.

Now, if the Court please, I desire to except to the refusal of the Court to give the first requested instruction on behalf of the defendant, for the reason first, because it has not been shown by the evidence that Clarence J. Benner's death was caused by any negligent act or conduct of this defendant. Second, because the evidence shows that Clarence Benner's death was caused by his own contributory negligence. Third, because the evidence fails to show that Clarence J. Benner at the time of his death had been emancipated from any obligation or the relation he might sustain under the law to his [138] father, A. S. Benner, and that his brothers and sister, or either of them, have not therefore been damaged to any extent, or in any amount, in that, in the absence of emancipation, any sums of money advanced by Clarence J. Benner to any brother or sister, under the evidence, would be an advancement from the father, who was entitled to and the owner of the wages of Clarence J. Benner, and not the contribution of Clarence J. Benner himself. Fourth, because the evidence fails to show that the said Clarence J. Benner ever contributed anything of his own, or belonging to him, to his brothers or sister, or either of them, and for the further reason that A. S. Benner, the father of the deceased, who was a minor, as shown by the complaint, at the time of his death, was entitled to all of his wages, and that in the absence of evidence showing emancipation the wages belonged absolutely to the father, and that

any contributions under the evidence, made, or alleged to have been made, to the brothers and sister in the complaint, were made simply with the permission of the father, A. S. Benner, and were not contributions on the part of Clarence Benner at all. And that in this action no damages can be awarded to the plaintiff, A. S. Benner, under the instructions of the Court and the pleadings, for the reason that he is claiming, and can claim, no damages on account of the death of the said Clarence J. Benner. And for the further and additional reason that it appears from the evidence that the death of Clarence J. Benner, deceased, was caused as shown by the evidence, by the negligent act of the Charles Butters Company, the employer of the said Clarence J. Benner, in failing, under the law as required, to furnish the said Clarence J. Benner a safe place within which to work.

I desire also, if the Court please, to except to the action of the Court in refusing to give defendant's requested instruction No. 3, in that the rule stated therein as to the measure of damages as to collateral and kindred, where there is no legal liability existing on account of the relation of the parties, such as father and son, or husband or wife, would be a mere matter of speculation, involving remote matters, upon which and about which there could be no evidence directed whatsoever.

I desire, if your Honor please, to except to the action of the Court in refusing to give defendant's requested instruction No. 7, in that under the [139] averments of the complaint and the evidence intro-

duced, it appears that Clarence J. Benner was in the employment of the said Charles Butters Company, Limited, at the time of his death, and that the Charles Butters Company, Limited, owed to said deceased as its employee, the duty of furnishing a safe place within which the said Clarence J. Benner could be employed, and that his death, as shown by the evidence, was caused by the failure and negligence of the Charles Butters Company, Limited, to so furnish to said Clarence J. Benner a safe place in which to perform his work.

I desire to except to the action of the Court in refusing to give to the jury defendant's requested instruction No. 11, in that the rule stated that the father was entitled and had the absolute right to the earnings of his son, under the pleadings herein and the issues made thereby, was a correct statement of the rule, so far as the relation of father and son is concerned; and that his right to sue for loss of wages or loss of services during the minority of the son, is vested under the law in the father alone, in the absence of an alleged emancipation and proof thereof; and the recovery on the part of other heirs or relations involves a chance of survivorship, the ability of the deceased to continue to work, his willingness after majority to work, or to contribute, and the question as to whether or not he should thereafter marry, and become the head of a family, and be required under his legal obligations to support such family.

I desire to except also to the refusal of the Court to give instruction No. 12, requested by the defend-

ant for the reason that there is no evidence in this case upon which to base any finding that anything was ever contributed by the deceased to Charles E. Benner during the life of Clarence J. Benner, and therefore nothing upon which to base any finding that he had any right of expectancy of any contributions had Clarence J. Benner continued to live. For the same reason as to George C. Benner, the other brother. For the same reason as to Will Benner, in that the only evidence so far as Will Benner was concerned, shows that the contributions made by Clarence J. Benner were for the purpose, as expressly testified, of relieving him of the stress caused by the violation of the Virginia & Truckee Railroad Company to give him continuous employment during a certain period [140] before the death of the said Clarence J. Benner.

I believe, if the Court please, I may be mistaken, I don't want to make a record upon anything I misunderstood, did the Court instruct that the pecuniary damages in its own language, were the exact amounts that the beneficiaries were shown to have sustained?

The COURT.—No, I gave simply a general instruction on that question, that the pecuniary damage was the precise measure of the actual injury received. It was a definition of the term pecuniary damage.

Mr. MASSEY.—I desire, if the Court please, to except to the refusal of the Court to give defendant's requested instruction No. 13, because if there is any testimony whatever of any expectancy, or right of expectancy, so far as the contributions were

concerned, from Clarence J. Benner, deceased, in after years to the sister, Mrs. Bogel, that such expectancy was limited to her alone by the evidence, and that she would have no right to recover anything on that account except the exact equivalent of what might have been a loss to her by reason of the death of Clarence J. Benner, in case such death should have been caused by the negligent act of the defendant company. I desire to except to the action of the Court in giving plaintiff's requested instruction No. 3—

Mr. BROWN.—Just a moment, Judge Massey. If the Court please, your Honor used a word in that instruction which I understood yesterday it was agreed could be struck out, and that was the word at the end of that instruction “gross” carelessness. It may be your Honor did not understand. The objection was made yesterday by Judge Massey to the word “gross” in connection with carelessness, and I would like to have it struck out.

The COURT.—It was marked out, but in the copy I used I forgot to strike it out.

Mr. BROWN.—We would like to have the instruction modified by striking out the word “gross.”

Mr. MASSEY.—I shall ask the Court to give the instruction to the jury in its modified form, because the context would leave that impression in the minds of the jury.

The COURT.—You may proceed.

Mr. MASSEY.—I desire to except to the instruction as given, and with the word “gross.” [141]

The COURT.—That will be corrected.

Mr. MASSEY.—For the reason said instruction is without the evidence in this case, and without application therefor. Did I understand that the word “insulation” of defendant’s wires was stricken out of the instruction as modified?

Mr. HEER.—It was done.

The COURT.—I will read it over, so there will be no question about that. I will read the 5th paragraph of instruction No. 3 again.

Mr. MASSEY.—The 4th and 5th paragraph has the word “insulate” in it.

The COURT.—In the 4th it was omitted, but I will read that also, if you wish.

Mr. MASSEY.—With the exception I have taken, with the modification as indicated, I don’t care to go any farther. Now, I desire to except to the giving of instruction No. 4 requested by the plaintiff, for the reason that the language therein has a measure of care, to wit, “as nearly as possible,” requires a higher degree of care, and that care amounting almost to an insurer, which is not required by law.

I desire to except to the giving of instruction No. 5 as requested by the plaintiff, for the reason that the degree of care, as defined in the instruction, conflicts with, and the degree of care required in, instruction No. 4. And for the same reason I except to the instruction No. 6, in that there is a conflict with the degree of care required as defined in the two separate instructions.

I desire to except to the giving of instruction No. 7 as requested by the plaintiff, for the reason that the evidence before the Court is not sufficient to show

what the scope or authority of the agent W. W. Wright was under his employment with the company, and it is therefore inapplicable in that it leaves the matter of the scope of employment based upon an instruction, without evidence upon which to base it, and any alleged negligent act of the agent Wright, is not shown by the evidence to have been within the scope of his employment with the Truckee River General Electric Company.

I also desire to except to the giving of instruction No. 8, in that there is no issue in this case that the condition of the wires of the defendant company were to any extent the cause of the death of Clarence J. Benner, deceased, and that part of the instruction "so as to become dangerous," as stated in the instruction, is without basis in evidence, in that all the evidence introduced as to the condition of the wires prior to the date of the accident, [142] and up to the time of the accident, shows that there was no danger whatever from those wires.

I desire also, if the Court please, to except to the giving of instruction No. 9, requested by the plaintiff, if it was given, in that there are no facts upon which to base this instruction, and it is therefore without application, so far as the case is concerned. And for the same reason I except and object to the giving of instruction No. 10, requested by the plaintiff; and for the additional reason that the rule stated therein reposes in the jury the duty of determining matters which must be based upon speculation, without evidence, and to which points there could be no possible evidence given.

I desire to except to the giving of instruction No. 11, as requested by the plaintiff, because there is no evidence upon which to base any claim for damages, other than mere nominal damages, as there are no damages shown as a matter of fact or as a matter of law, to have been sustained by the brothers and sister of the deceased, or by either thereof.

The COURT.—Judge Massey, did you understand me to instruct the jury they were to take the present worth of the contributions already made?

Mr. MASSEY.—Take that as a basis for fixing the present worth.

The COURT.—I did not quite understand your objection.

Mr. MASSEY.—I may not have made myself clear. I intended to say that as the basis of fixing the present worth of any damages.

The COURT.—I thought from your objection you understood me to say it was the present worth of the contributions already received. They are to consider the contributions heretofore received in determining what Clarence Benner would probably contribute to the support of his brothers and sister hereafter.

Mr. MASSEY.—You gave an instruction as to the present worth, making as basis contributions before his death made by Clarence Benner to his brothers and sister, and my objection to that, if your Honor please, was that there is no basis, except a mere speculation.

The COURT.—I understood the objection, but I did not understand whether I had given the instruc-

tion as I meant to or not. [143]

Mr. MASSEY.—I think you gave it correctly, and perhaps I made a slip of the tongue in my exception; but my intention was to make the exception as stated.

The COURT.—Gentlemen (addressing the jury), the instruction No. 3, in which “gross carelessness” is used, and where the word “insulation” was possibly used, should read as follows:

Clarence Benner was entitled to assume that the Truckee River General Electric Company had taken every proper precaution to protect the public from coming in contact with dangerous currents of electricity which it might transmit over its lines. Benner was not bound in the exercise of that ordinary care which the law requires of him, to make any investigation as to the condition of defendant’s wires, unless he was put upon inquiry by some discovery or some suggestion of danger which under the circumstances it was carelessness for him to neglect.

I will say, gentlemen, regarding the argument which has been made with reference to the carelessness of the Butters Company, Limited, this: That testimony has been admitted, and it is a part of the circumstances of the case; but if you find from the testimony that the death of Clarence Benner was due proximately and directly to the negligence of this defendant, the defendant is liable, even though the Butters Company may have been negligent itself. Do you wish to take any further exception?

Mr. MASSEY.—I think my exception heretofore taken to the refusal of the Court as requested per-

haps covers that, but I desire at this time in order to save that point, to except to the instruction of the Court as given last, for the reason if the Butters Company, Limited, was by its negligence directly and proximately the cause of the death of Clarence J. Benner, that the defendant in this case could not be liable for any act of negligence committed by the Butters Company.

The COURT.—That also is true; they would not be liable for the negligence of the Butters Company, but they would be liable for their own negligence, and if their own negligence, notwithstanding the negligence of the Butters Company, was proximately and directly the cause of this disaster, [144] I instruct the jury that the defendant is liable.

Thereupon the jury at 3:50 P. M. retired to consider their verdict, and at 9:55 P. M. returned into court with the following verdict:

“We, the jury in the above-entitled case, find for the plaintiff, and assess the damages in the sum of \$7000.00.

P. S. GREELEY, Foreman.

Dated, April 18th, 1912.”

And now comes the above-named defendant, and presents this, its proposed Bill of Exceptions, and prays that the same may be allowed, and made a part of the record of this action, which is hereby done this 20th day of May, 1912.

E. S. FARRINGTON,
Judge.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. A. S.

Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. No. 1109. Bill of Exceptions. Filed 24th day of May, 1912. T. J. Edwards, Clerk. Messrs. Mack, Green, Brown & Heer and Mr. Gray Mashburn, Attorneys for Plaintiff. Mr. W. A. Massey and Messrs. Cheney, Downer, Price & Hawkins, Attorneys for Defendant.

Due and legal service after filing, admitted this 23d day of May, A. D. 1912, without waiving any rights.

MACK, GREEN, BROWN & HEER,
Attorneys for Plaintiff. [145]

[Deposition of E. C. Gerrey, for Plaintiff.]

*In the United States District Court of the District
of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,
vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

To the Truckee River General Electric Company, a Corporation, Defendant, and to Messrs. Cheney, Downer, Price and Hawkins and W. A. Massey, Attorneys for Defendant:

Please take notice that the plaintiff herein will take the testimony of E. C. Gerrey, who resides at Monterey, County of Monterey, State of California,

and resides more than one hundred miles from the place of the trial herein, and more than one hundred miles from any place at which the District Court of the United States for the District of Nevada is appointed by law to be held, from whence his attendance at the trial of said cause cannot be obtained by subpoena of this court or otherwise, to be read in evidence on the trial of said cause on the part of the plaintiff herein, before Silas W. Mack, a Notary Public in and for the County of Monterey, State of California, at the office of said Silas W. Mack in said Monterey, on the 16th day of February, A. D. 1912, at the hour of two o'clock P. M. of said day, and continuing from day to day thereafter until completed.

Such testimony will be so taken in accordance with the provisions of Sections 863, 864 and 865 of the Revised Statutes of the United States.

Dated this 7th day of February, 1912.

MACK & GREEN,
Attorneys for Plaintiff.

Service of a copy of the foregoing notice admitted this 7th day of February, 1912.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Deft. [146]

*In the United States District Court for the District
of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Deposition of E. C. Gerrey, a witness produced on
behalf of the above-named plaintiff, taken before
Silas W. Mack, a Notary Public in and for the
County of Monterey, State of California, at his of-
fice in the City of Monterey, County of Monterey,
State of California, on the 16th day of February,
A. D. 1912, pursuant to the annexed notice.

United States of America,
State of California,
County of Monterey,—ss.

On the 16th day of February, 1912, before me,
Silas W. Mack, a Notary Public in and for the
County of Monterey, State of California, at the time
and place specified in the annexed notice, personally
appeared E. C. Gerrey, a witness produced on behalf
of the above-named plaintiff, pursuant to the an-
nexed notice; said witness was then and there sworn
by me to tell the truth, the whole truth, and nothing
but the truth in the above-entitled action.

A. A. Heer, of the firm of Mack, Green, Brown &
Heer, of counsel for plaintiff, was then and there
present for and on behalf of the above-named plain-

(Deposition of E. C. Gerry.)

tiff, and Prince A. Hawkins of the firm of Cheney, Downer, Price & Hawkins, counsel for defendant, was then and there present on behalf of the above-named defendant. The following questions were then and there asked, answers given and proceedings had.

E. C. GERREY, being first duly sworn, testified as follows, to wit:

Direct Examination by A. A. HEER.

Question. What is your full name, Mr. Gerrey?

Answer. Ernest Clifford Gerrey.

Q. What is your business, Mr. Gerrey?

A. Lineman.

Q. What kind of lineman—what do you mean by that?

A. Well, power line, construct electric [147] line.

Q. Where do you reside, Mr. Gerrey?

A. In Monterey.

Q. County of Monterey, State of California?

A. Yes, sir.

Q. Are you employed here? A. I am.

Q. By whom?

A. Monterey County Gas & Electric Company.

Q. How long have you resided here?

A. Since sometime in August.

Q. How long have you been in the employment of the company mentioned? A. Since August.

Q. Where did you reside before you came here, Mr. Gerrey?

(Deposition of E. C. Gerry.)

A. Well, from here I came from Concord, California.

Q. How long did you reside there?

A. From the middle of May until August.

Q. Of what year?

A. Of nineteen hundred and eleven.

Q. Where did you reside before May, nineteen hundred and eleven? A. Virginia City, Nevada.

Q. How long did you reside there?

A. I don't remember how many years I was there.

Q. Was it more than two years? A. Oh, yes.

Q. More than three?

A. Probably five or six years before nineteen hundred and eleven. That is my home, you know.

Q. By whom were you employed there, Mr. Gerrey? A. By the Charles Butters Company.

Q. By anybody else?

A. Well, yes, different parties.

Q. Did you ever work for the Truckee River General Electric Company? A. Yes, sir.

Q. When? A. At different times.

Q. In what capacity? A. Electrical work.

Q. By whom were you employed—that is, I mean by what person?

A. Well, I hired under Mr. Broili, he is—he was the President.

Q. Was it Mr. Broili that employed you?

A. He is the man I hired out to, yes.

Q. When did you first go to work for the Truckee River General Electric Company?

A. Well, I have forgotten now.

(Deposition of E. C. Gerry.)

Q. Well, give it as nearly as you can.

A. That is so far back I don't remember what year it was in fact.

Q. Was it as early as nineteen hundred and five?

A. No, it was later than that I think.

Q. In whose employ were you on the eighteenth of August, nineteen hundred and nine?

A. Charles Butters Company.

Q. Did you know a man by the name of Wright in Virginia City? A. I did.

Q. What is his first name? A. Will Wright.

Q. Do you know what his business was?

A. He was in connection with the power company.

Q. Do you know whether he was connected with the company in August, nineteen hundred and nine or not? A. I think he was, yes.

Q. How long before the eighteenth of [148] August, nineteen hundred and nine had you been in the employ of the Butters Company, do you remember?

A. Something over two years or such a matter.

Q. Before that time whom had you worked for—immediately before that time?

A. For the Truckee River General Electric Company.

Q. Do you know whether or not Mr. Wright was connected with that company at that time or not?

A. Yes.

Q. Did Mr. Wright have anything to do with your employment? A. I worked with him.

Q. You worked with him in and about the business

(Deposition of E. C. Gerry.)
of the General Electric Company?

A. Yes, sir.

Q. In August, nineteen hundred and nine, where were you working for the Butters Company?

A. At the Chollar mine.

Q. How long after that time did you remain at that place—how long after August, nineteen hundred and nine? A. I don't remember.

Q. Let me put it another way then. Did you know Clarence Benner during his lifetime?

A. I did.

Q. Do you remember the occasion of his death?

A. I do, yes.

Q. And were you in the employ of the Butters Company at that time? A. I was, yes.

Q. How long after that time did you remain in their employ?

A. I don't remember. In the employ of the Company up until May of last year.

Q. What was the nature of your employment at the time of Benner's death, that is, what kind of work was you doing?

A. Electrical work in and around the mine.

Q. Do you recall a line there that crossed a snowshed near the Chollar mine? A. I do.

Q. When did you first become acquainted with that line?

A. Well, from the time I went to work there in fact.

Q. Was that there at the time of Benner's death?

A. It was.

(Deposition of E. C. Gerry.)

Q. What kind of a line was it, Mr. Gerrey?

A. It was a power line.

Q. What power was it carrying if you know?

A. That I do not know.

Q. Well, approximately.

A. It was considered a primary line.

Q. Do you know what the condition of that line was at the snowshed on the date of Benner's death?

Mr. HAWKINS.—This is too indefinite.

A. Well, there was a wire on the roof, I know that.

Mr. HAWKINS.—I move to strike the answer because not responsive to the question.

Q. Mr. Gerrey, how was that wire carried over the roof of the snowshed in its normal condition? By what was it supported? A. By a pole line.

Q. When it was in its normal condition how high [149] was the wire above the top of the snowshed?

Mr. HAWKINS.—Object to the question because it is incompetent and because there is no evidence showing that the witness knows what the condition of the line was at any time and because there is no evidence showing anything about what the normal condition referred to in the question means or was.

Mr. HEER.—(To Mr. GERREY.) Well, you answer the question.

Mr. HAWKINS.—I would like to object to the question further for the reason that there is no evidence showing that the witness knew anything about the normal condition or any condition of the wire prior to August eighteenth, nineteen hundred and nine.

(Deposition of E. C. Gerry.)

Mr. HEER.—(To Mr. GERREY.) Well, you answer the question now.

A. Well, I can't. I don't know how far it was above the building, I did at the time I reckon. I don't remember now what it was.

Q. You say you did at the time. What time do you mean?

A. Well, on or before the eighteenth of August.

Q. How long before that time had you been familiar with that wire?

A. Well, as I stated before, up until I was first employed there.

Q. Up until you were first employed there—by whom? Employed by whom?

A. By the Butters Company.

Q. Well, when was that?

A. Well, as I stated, I do not know when I did go to work there at the mine.

Q. Well, approximately. How long before Benner's death? A. A few months.

Q. During that few months that you speak of were you familiar with the condition of that wire? During the few months you speak of being employed by the Butters Company at the Chollar mine were you familiar with that wire? A. Not before that, no.

Q. I asked you, Mr. Gerrey, if during the few months preceding Mr. Benner's death, when you have stated, that you were in the employ of the Butters Company at the Chollar mine, you were familiar with that wire?

A. I do not get your question now.

(Deposition of E. C. Gerry.)

Q. Well, now, you say that you were employed by the Butters Company at the Chollar mine for a few months before Mr. Benner's death?

A. Yes, sir.

Q. I will ask you now if during that time you were familiar with that wire passing over the snowshed?

A. Yes.

Q. Can you now say what the condition of that wire was during those few months with reference to the snowshed? [150]

Mr. HAWKINS.—I object to the question on the ground that it is indefinite, uncertain as to what is intended being meant by the condition of the wire as referred to in the question.

A. Well, the wire was slack.

Q. Do you know, Mr. Gerrey, when it first became slack? A. No.

Q. Do you know whether it was slack or not on the eighteenth day of August, nineteen hundred and nine? A. Yes.

Q. How long before that time, if at all, did you know of its being slack?

A. Well, some time in July I noticed it was slack.

Q. Now, Mr. Gerrey, if the wire was not slack, but taut, how high would it be above that snowshed at that time?

A. I do not remember how far it was.

Q. Well, as nearly as you can tell.

A. Well, I can't answer that without knowing. Well, I should judge a few feet.

Mr. HAWKINS.—Strike the answer as not being

(Deposition of E. C. Gerry.)

responsive to the question and being imagination of the witness and not any definite answer.

Q. How many feet do you mean by a few feet, Mr. Gerrey? A. Well, I can't say.

Q. Put it in figures as nearly as you can.

A. I can't place any distance not knowing. I might have at the time, but I have forgot now.

Q. You mean a hundred feet?

A. Well, hardly; maybe two or three, or five, I do not know.

Q. Was it more than two feet?

A. I should imagine, yes.

Mr. HAWKINS.—I move to strike the answer out as not responsive to the question.

Q. To the best of your recollection, Mr. Gerrey, was it two feet or more?

A. It was possibly more. I can't recall the distance at all now.

Mr. HAWKINS.—I move to strike the answer as not responsive, being speculative and not in any way definite or certain.

Q. Mr. Gerrey, I don't want your imagination or your guesses—I would like for you to state to the best of your recollection.

A. That is what I am doing. It is so long back that I can't remember.

Q. Well, now, just state what that height was above the snowshed.

A. In stating I would state wrong because I don't remember.

(Deposition of E. C. Gerry.)

Q. You say you knew of that condition from some time in the latter part of July. Can you tell me when you first noticed it that the guy wire was slack, how high the power wire was above the snowshed?

A. Well, there was a few inches between them.
[152]

Q. Mr. Gerrey, was the guy wire so fastened to the pole and to that bolt you have spoken of—which way did it run from the snowshed? Was the top of the wire—the wire on the pole—fartherest from the snowshed or the bottom if fartherest from the snowshed?

Mr. HAWKINS.—I object to the question for the reason that witness does not testify, as I recall it, that at any time did he ever see the guy wire attached to the pole referred to.

A. Well, the bottom of it was further from the shed.

Q. Did you ever see the guy wire when it was in place and fastened to the bolt, Mr. Gerrey?

A. I did.

Q. At that time what was the condition of the pole with reference to being upright or leaning?

A. The pole was upright at that time to the best of my knowledge.

Q. What effect did the leaning of that pole have upon the wire passing over the snowshed?

Mr. HAWKINS.—Objected to as incompetent, calling for conclusion of witness which is a matter that the jury may determine from the facts as well as the witness can draw a conclusion. It is incompe-

(Deposition of E. C. Gerry.)

tent. A. Well, causing slack.

Q. Mr. Gerrey, what did you do with reference to that loosened guy wire and sagging power wire when you first discovered it. A. I notified the manager.

Q. Who do you mean by the manager?

A. Mr. Stone.

Q. Do you know when that was?

A. Well, I can't call the date at the present time.

Q. Well, as nearly as you can.

A. To the best of my knowledge it was in the latter part of July some time.

Q. How often did you report that to Mr. Stone—once or more?

A. Well, I don't know whether I spoke to him, that is personally, with regard to that afterwards or not. It may have been brought up in conversation.

Q. Did you ever speak to anybody else about it?

A. To Mr. Wright.

Q. How many times did you speak to Mr. Wright about it?

A. Well, I don't remember how many times.

Q. More than once? A. Yes, I think it was.

Q. More than twice?

A. Well, I don't know how many times it was in fact.

Q. Do you remember when the first time you spoke to him about it was? A. When it was?

Q. When it was? A. I don't remember.

Q. How long was it before Mr. Benner's death?

A. Well, I don't know how long before that. Can't recall the time.

(Deposition of E. C. Gerry.)

Q. Was it before or after you spoke to Mr. Stone about it the first time?

A. It was after that. [153]

Q. Can you tell how long it was after that?

A. A few days to the best of my knowledge.

Q. Then it was in July or August, nineteen hundred and nine?

A. Well, I don't know. I notified Mr. Stone in the latter part of July some time and I don't remember the exact day when I notified Mr. Wright.

Q. Was it a week afterwards?

A. Possibly. Possibly more. I can't call the date—I have forgotten the date of it.

Q. To the best of your recollection, Mr. Gerrey, tell us how long that was before the date of Benner's death?

A. To the best of my knowledge it must have been three weeks, or such a matter.

Q. Where was Mr. Wright when you spoke to him?

A. I met Mr. Wright going home from work. He was in Steffen's butcher-shop.

Q. In what town was that? A. Virginia City.

Q. What did you say to Mr. Wright on that occasion?

A. I asked him if Mr. Stone had spoken to him with regard to the line?

Q. What did he say? A. He said he had.

Q. And what else was said at that conversation about the line?

(Deposition of E. C. Gerry.)

A. Well, nothing more than that—just as I have stated.

Q. Did you say anything to him about the condition of the line or not?

A. Well, we talked it over, yes.

Q. Well, tell me what you said to him as nearly as you can about the line and its condition?

A. Well, I told him the line was slack and to go over and look at it.

Q. Did you tell him that it was slack?

A. I believe I did.

Q. What did you tell him?

A. I told him a guy wire had become loosened.

Q. What did Mr. Wright say in reply to that?

A. Said he would give it his attention.

Q. Can you remember exactly just what was said at that time by either of you?

A. I don't believe there was.

Q. Do you know whether or not Mr. Wright did go over to look at that after that time?

A. After the time I spoke to him?

Q. Yes. A. I think he did, yes.

Q. Do you know when that was—how long after you talked with him?

A. No, I can't call what time it was.

Q. Do you know how long it was before Mr. Benner's death? A. No, I don't exact.

Q. Well, was it days or weeks?

A. It may have lapsed into a week between the times.

Q. Between what times?

(Deposition of E. C. Gerry.)

A. We was talking about it and the time he looked at it.

Q. Well, how long would you say that was before Mr. Benner's death? A. Possibly a week.

Q. Did you ever talk to Mr. Wright about that at any other time?

A. Well, no more than just in our [154] conversation—I believe it was brought up.

Q. At another time? A. Yes, sir.

Q. Where was that?

A. I believe at the Chollar mine.

Q. How long was that before the date of Benner's death?

Mr. HAWKINS.—Object to the question for the reason that witness has not stated that the conversation with Mr. Wright at the Chollar mine, just referred to by the witness, was before or after the death of Benner, no time having been fixed as to when the conversation referred to was had.

A. I don't remember how long it was.

Q. Well, tell us to the best of your recollection, Mr. Gerrey.

Mr. HAWKINS.—Object to the question for the reason above stated, there being no testimony by the witness to the effect that the conversation referred to was before Benner's death.

Q. You recall the question, Mr. Gerrey?

A. I cannot recall how long it was—I am not sure.

Q. Well, Mr. Gerrey, you certainly remember whether it was a month or a year, don't you? You

(Deposition of E. C. Gerry.)

remember whether it was a day or a month, don't you?

A. Yes. Well, I would have to say possibly a few days or a week. I can't remember. Possibly it was, possibly it wasn't.

Q. Was it more than a day?

A. It was more than a day, yes.

Q. Was it more than two days?

A. Yes, as I stated, possibly a week—I don't know the exact day.

Q. Well, is that your best recollection at this time?

A. Yes, sir.

Q. You say that was at the Chollar mine?

A. Yes, sir.

Q. How far was that from where the pole itself—or the pole to which the wire was attached—the guy wire?

A. Well, that was some distance from where the pole was—it was below the mine.

Q. Mr. Gerrey, give us to the best of your recollection as to how far it was from the pole.

A. Well, possibly two or three hundred yards.

Q. What was said by you or by Mr. Wright at that time upon this subject?

A. There was something mentioned about it—what it was I can't call now.

Q. Did you speak to Mr. Wright about it or did he speak to you about it?

A. Well, it seems to me I brought it up.

Q. What is your recollection of what you said to Mr. Wright then?

(Deposition of E. C. Gerry.)

A. Well, I don't know what it was. I can't remember. There was something brought in about it though.

Q. Do you remember what Mr. Wright said about it at that time? A. No, I don't.

Q. You don't remember a word about what you said or Mr. Wright said?

A. No, I know [155] there was something said with regard to it, but what it was I don't remember now.

Q. Did you have any other conversation with Mr. Wright upon that subject before Benner's death?

A. Not that I remember now.

Q. That is all that you recall?

A. That is as near as I can remember at the present time. There may have been more but I do not remember them.

Q. Do you know whether or not at that time Mr. Wright saw either the pole or the guy wire or the power wire passing over the shed?

A. No, I do not think he did.

Q. How often during the time you knew that guy wire to be loose before Mr. Benner's death, did you see the wire over the shed?

A. How often did I see it? The wire?

Q. Yes.

A. Well, I saw it pretty regular—in and out of the mine all the time.

Q. Every day?

A. Well, not every day. Some days it would be two or three times a day and then again it would not

(Deposition of E. C. Gerry.)

be for several days.

Q. Do you remember what time of the day it was that Mr. Benner was killed?

A. It was in the forenoon—the lunch hour.

Q. What hour of the day would that be?

A. Well, at the time they had been coming out—possibly ten minutes to twelve or five minutes to twelve, or such a matter.

Q. In the forenoon? A. Yes, sir.

Q. Do you remember whether or not you noticed that wire on the morning of that day?

A. Well, I can't say that I did.

Q. When is the last time before Mr. Benner's death that you can remember having seen that wire?

A. Well, I seen it from a distance every day, but not right up to observe closely to it.

Q. Do you know how high the wire was above the roof of the shed on the morning of Mr. Benner's death? A. No, sir.

Q. Do you know how high it was the day before?

A. No, sir.

Q. Well, tell us how high it was the last time you remember of seeing it before Mr. Benner's death.

A. There was a few inches between—possibly four or five inches.

Q. Four or five inches? A. Possibly that much.

Q. You say possibly that much. Tell us to the best of your recollection.

A. Well, I should judge it to be about four or five inches.

Q. Now, when was it with reference to Mr. Ben-

(Deposition of E. C. Gerry.)

ner's death that you saw it four or five inches above the shed?

A. Well, I can't recall it to a day, it was possibly a few days or a week before—maybe longer.

Q. Do you know whether or not after the first time you spoke to Mr. Wright he did go there to see that wire or not? [156]

A. Yes, he drove there and looked at it himself.

Q. Were you there at that time?

A. No, I had just come out to lunch and I seen him driving out that way.

Q. Where was he when you saw him?

A. He was driving in a rig toward where this pole was.

Q. How far away from the pole was he?

A. Where he was?

Q. Yes. A. Oh, it was some distance.

Q. Mr. Gerrey, what do you mean from some distance?

A. Well, he had to go around the mine to get into the millsite. It was probably two blocks or further.

Q. Do you know how high the wire was above the roof of the shed at that time? A. No, I don't.

Q. Have you no recollection on the subject?

A. No, not at that time.

Q. How long before that particular time was it that you remember of seeing that wire?

A. The first time?

Q. How long before the occasion on which you say Mr. Wright came there, do you remember of seeing the wire?

(Deposition of E. C. Gerry.)

A. Oh, that was some little time before, but how long I can't tell.

Q. Had you seen it the day before?

A. No, it was a week possibly.

Q. I do not mean, Mr. Gerrey, the first time you saw it, but the last time you saw it before Mr. Wright came there. A. Well, I was past it that day.

Q. Well, now, can you tell us how high it was above the roof on that day when you passed it?

A. No, I can't.

Q. Well, now, give us the best of your recollection on that subject.

A. I can't give you—it was three or four inches right along up until possibly that day—it may have been—

Q. Well, can you say whether or not on that day it was. A. No, I can't.

Q. Can you say whether or not on that day it was more than three or four inches above?

A. No, I can't; I didn't know as I looked up at it.

Q. When was the last time before that day that you remember of seeing it?

A. Well, as I said, I used to pass there probably once in two or three days and it may have been a few days before that that I had a chance to look at it.

Q. How high was the wire above the shed, Mr. Gerrey, the first time you noticed it after you saw that guy wire loosened and that the wire was sagging?

A. I don't remember how far it would be. It was up higher though than the four inches. [157]

(Deposition of E. C. Gerry.)

Q. About how much higher, Mr. Gerrey?

A. Well, I don't know. Possibly six or eight inches; I can't tell—within two feet.

Q. You can't tell within two feet?

A. Well, looking over the gable roof you could see the light through it and it might have been a greater distance—deceiving to the eye.

Q. Can you say whether or not it was sagging in the place you saw it? A. Well, yes.

Q. Can you state how much it was sagging from a straight line? A. No, I can't.

Q. Did you ever go up on the snowshed yourself?

A. No, sir, not myself. I did after the line was—

Q. I mean before the death of Mr. Benner?

A. No.

Q. Mr. Gerrey, do you know whether or not that guy wire was ever replaced upon that bolt?

A. It was.

Q. When? A. On the evening of the accident.

Q. Do you know who replaced it?

Mr. HAWKINS.—I object to the question as being incompetent, calling for matters that transpired after the accident and not being a part of the *res gestae* and not in any way connected with the incident and in no way binding upon the defendant company.

A. Mr. Wright, I believe.

Q. Did you see it done?

A. No, I didn't see it done. I was sent for and came there about the time it was tightened up.

Q. When was that, Mr. Gerrey?

(Deposition of E. C. Gerry.)

A. (Mr. HAWKINS.) I would like for the record to show that defendant objects to the question just asked and to the preceding questions asked subsequent to the last objection and to all future questions that may be asked with reference to matters that were done subsequent to the accident for the reasons assigned in the preceding objection.

A. On the evening of the accident.

Q. Were you at the pole on that evening?

A. Yes, I was there.

Q. Who else was there at the time you were there?

A. Well, there were several standing around.

Q. Name those that you can.

A. N. I. Morgan was sitting a short distance from the pole—not right at the pole.

Q. Anybody else you can name?

A. Will Wright and myself.

Q. Well, just describe, Mr. Gerrey, what you found when you came there with reference to the condition of the guy wire.

Mr. HAWKINS.—Object to the question as incompetent, irrelevant and immaterial for the reason that the condition of the guy wire in which it was found by the witness on the evening of the day of the accident which occurred in the forenoon, is incompetent. [158]

Q. Answer the question, Mr. Gerrey.

A. I found it tightened up.

Q. Was the bottom end of it fastened to anything?

A. It was fastened to a pipe, if I remember.

Q. Was the pipe fastened to anything?

(Deposition of E. C. Gerry.)

A. The pipe was in the ground; yes.

Q. Did you notice at that time whether or not the wire passing over the shed was taut?

Mr. HAWKINS.—Objected to as incompetent, objection being for the reasons stated in previous objections. Calling for a condition—physical condition—existing after the accident and after work had been done upon the pole or in connection with it.

A. It was; yes.

Cross-examination by PRINCE A. HAWKINS.

Q. What time of the afternoon of August eighteenth, nineteen hundred and nine, was it when you say you went down to the pole referred to in your examination? A. It was about six or a little later.

Q. And the accident occurred in the forenoon of that day? A. Yes, sir.

Q. How was that guy wire fastened at that time, Mr. Gerrey? A. In the afternoon?

Q. Yes. A. It had been pulled up to a pipe.

Q. The lower end being wrapped around a pipe?

A. It was made into an iron pipe in the ground.

Q. What was the dimension of that pipe—what was the diameter, do you know?

A. I don't remember.

Q. Good-sized pipe, or small?

A. It was a good-sized pipe—an old water pipe at the mill. Possibly an eight or twelve-inch cast-iron pipe.

Q. It had been a water pipe there in the old mill?

A. Yes.

Q. Then it was embedded in the ground or in the

(Deposition of E. C. Gerry.)

foundation, or how was it fastened in the ground?

A. It was embedded in the ground.

Q. Good, solid, substantial pipe? A. Yes.

Q. How was the wire—the guy wire—pulled up to wrap around that pipe? What method was used in straightening it up, if you know?

A. In pulling it back to the pipe?

Q. Yes.

A. I don't know. It was pulled up before I got there.

Q. Was it a difficult matter to straighten that pipe or was it a simple matter?

A. It was just a simple matter of pulling it up and pulling it in.

Q. How much time would it take to pull that up and fasten that guy wire around the pipe?

A. Well, possibly five minutes or such a matter—a few minutes.

Q. Do you remember what Wright came over for at that time? [159] A. To the mine?

Q. Yes. A. He came over to set some meters.

Q. Now, do you recall whether that was before or after Benner's death?

A. That was before Benner's death.

Q. You don't know how long?

A. No, I don't remember how long it was.

Q. You can't be mistaken about that being before Benner's death, can you?

A. Well, no; I might be, but I hardly think so.

Q. The first time that you spoke to Wright, as I understand your testimony, was on the evening when

(Deposition of E. C. Gerry.)

you were both coming home and he came out of the butcher-shop and went on up the street?

A. Yes, sir.

Q. And you and Wright lived along the same way from the place of your business?

A. Yes, we had to go up the same street.

Q. And when you spoke to him about that time he said that Stone had spoken to him about this wire?

A. I said?

Q. Wright said. A. Yes.

Q. Do you recall whether he said anything about having returned from any trip at that time?

A. He never mentioned it, no.

Q. Do you know whether he had just that day or the day before returned from a trip to Yerington?

A. No, I don't. Nothing was mentioned.

Q. From your observation of that wire over the snowshed did you or not regard it as a matter that needed immediate attention as being a very dangerous matter or not?

Mr. HEER.—I object. Incompetent, irrelevant and immaterial. Calling for the conclusion of the witness and not cross-examination concerning anything inquired into in chief.

A. Well, no; I did not think so; if I had I would have fixed it myself.

Q. From what you said to Mr. Wright you say there was nothing said in the first conversation that would advise you that he had just returned from Yerington or some other place?

Mr. HEER.—I object to the question as improper

(Deposition of E. C. Gerry.)

cross-examination, not touching any subject inquired into upon examination in chief.

A. Not that I remember.

Q. In talking to Wright about the wire over the snowshed you didn't tell him that it had to be fixed immediately and it was very dangerous or anything of that kind did you? A. No.

Q. You say that you passed under this wire frequently and sometimes you looked at it and sometimes you didn't—is that correct? A. Yes, sir.

Q. These wires between poles are always sagging more or less, aren't they, Mr. Gerrey?

Mr. HEER.—I object to the question as irrelevant, improper and immaterial and not proper cross-examination, touching no question inquired into in direct examination.

A. All lines, yes, have some sag. [160]

Q. Do you know how the guy wire was originally fastened to the ground—or rather the ground end of the guy wire—how was that originally fastened?

Mr. HEER.—I object to the question as being indefinite, fixing no time whatsoever.

A. To an iron bolt fastened in concrete foundation on the millsite.

Q. How large was that bolt if you know?

A. I don't remember how large a bolt it was. It was—

Q. Was the guy wire fastened to that bolt when you first went to work for the Butters Company, Limited?

A. Well, I don't remember whether it was or not

(Deposition of E. C. Gerry.)

—I think it was though fastened to something.

Q. You don't know whether it was fastened to that bolt or not?

A. I never observed close enough to notice whether it was or not.

Q. Do you remember when that foundation was blasted?

Mr. HEER.—I object to the question as incompetent, irrelevant and immaterial, and not proper cross-examination, touching no subject inquired into in the examination in chief, it not appearing from witness' testimony that the foundation was ever blasted out.

Mr. HAWKINS.—I withdraw the question.

Q. Do you know whether or not the foundation of the old millsite near this guy wire was blasted out, or turned down?

Mr. HEER.—I object to the question as incompetent, irrelevant and immaterial, and being improper cross-examination, as it touches no subject inquired into in the examination in chief.

A. It was blasted out to the best of my memory.

Q. When was that?

A. When was it blasted out?

Q. Yes.

A. Well, they were blasting there several months.

Mr. HEER.—Will the records show that the same objection last made, is made to all questions following upon the same subject without repetition?

Q. When was it they were blasting?

Mr. HEER.—Same objection.

(Deposition of E. C. Gerry.)

A. Before and after the boy was killed.

Q. Were they blasting there before you testify that you noticed that the guy wire was loosened?

Mr. HEER.—Same objection. A. Yes, sir.

Q. How long before that time that you say you noticed that the guy wire had become loosened?

Mr. HEER.—Same objection.

A. They were blasting there every day—up to that day even.

Q. Who was doing this blasting?

Mr. HEER.—Same objection.

A. I presume it was leasers taking quicksilver from the mill.

Q. Did you see at about twenty-five feet from the pole to which the guy wire was attached a big rock or post of concrete that had been buried and upon which this guy wire had [161] been originally attached—prior to the time that you testified you noticed that the guy wire had become loosened?

A. I don't remember whether I did or not.

Q. Can you now testify as a positive fact that at any time you saw the guy wire attached to the bolt in the concrete foundation, or is your testimony with regard to that a matter of your general recollection?

A. No, because I placed it there myself.

Q. When?

A. Possibly a year or two before that.

Q. That was during the year nineteen hundred and five when you were working for the Truckee River General Electric Company?

A. It was when I was working for the Truckee

(Deposition of E. C. Gerry.)

River General Electric Company.

Q. How long did you work for the Truckee River General Electric Company at that time, Mr. Gerrey?

A. I don't remember how long it was.

Q. Just a short time, wasn't it?

A. Possibly two or three months or such a matter, I don't know exactly.

Q. That guy wire may have been loose from the bolt referred to by you for some time prior to the time you say you discovered it, may it not?

A. It may have, yes.

Q. Do you know when the snowsheds to which you refer were built?

A. Well, I remember of being built, but I don't know at what time.

Q. They were built after you began work for the Butters Company? A. Yes, sir.

Q. They were constructed after the line to which you have testified was constructed? A. Yes.

Mr. HEER.—I object to the question as irrelevant, incompetent and immaterial and not tending to prove or disprove any issue in this case.

Q. How long had this wire-power line that crossed the snowshed—how long had that line been up to your knowledge?

A. Well, I don't remember how long that line had.

Q. Was it there when you went to work for the Butters Company? A. Yes, long before that.

Q. What was that wire used for, Mr. Gerrey?

A. To carry power originally to the Hale-Norcross Mine.

(Deposition of E. C. Gerry.)

Q. What was it being used for at the time of the accident referred to and for some months prior thereto?

A. Well, Butters had a tap onto it feeding the rock breaker.

Q. Where was that tap made with reference to the main line?

A. To a pole north of the snowshed, the first pole north.

Q. Did you make that tap? A. No.

Q. The power then that was passing through the line that crossed the snowshed was being used by the Butters Company at the time of the accident?

A. It was running their machinery, yes.

Q. It was used for lighting the mine and [162] furnishing power in the mine and for running the Butters Company's rock crusher?

A. Well, this line itself was only used for the rock crusher.

Q. That is the line that crossed the snowshed?

A. Yes. The main line was to the west of this line.

Q. And the line that crossed the snowsheds was being used solely for carrying power to the rock crusher? A. Yes.

Q. You were in charge of the Butters Company as their electrician at the time?

A. At the mine, yes.

Q. Who was the Mr. Stone that you referred to?

A. He was the manager of the Butters Company—as an electrician for the Butters Company.

(Deposition of E. C. Gerry.)

Q. If you had considered this line a dangerous one at the time, I understand you say you would have gone and fixed it yourself. Is that correct?

A. I would have, yes.

Q. Referring to the leasers that you spoke of a while ago, did they do any excavating around the ground end of this guy wire?

Mr. HEER.—I object to the question as irrelevant, incompetent and immaterial, not tending to prove or disprove any of the issues in this case and not being proper cross-examination for the reason that it does not touch any matters inquired into in direct examination.

A. Well, they were moving earth from all around—on the whole site at various places.

Mr. HEER.—I move that the answer be stricken out as not being responsive to the question.

Q. You mean by removing earth that they were excavating and digging there for quicksilver?

Mr. HEER.—I object to the question as being irrelevant, incompetent and immaterial and not tending to prove or disprove any of the issues of this case, and not being proper cross-examination. It does not touch upon any matter inquired into upon direct examination. A. Yes.

Q. Do you remember the last time you saw the guy wire attached to the bolt in the foundation of this mill? A. No, I don't remember.

Q. I don't remember whether I asked you or not when the snowshed was built. Will you kindly state when the snowsheds were built of which you testify?

(Deposition of E. C. Gerry.)

Mr. HEER.—I object to the question first, for the reason that it has been already asked and answered, second, because it is irrelevant, incompetent and immaterial, not tending to prove or disapprove any of the issues of this case, and third, for the reason that it is not proper cross-examination, not touching any matter inquired into upon direct examination.

[163]

A. Well, I don't remember the time when they were built.

Q. Were they built after you went to work for the Butters Company or before?

Mr. HEER.—Same objection.

A. They were built after.

Q. About how long before Benner's death?

Mr. HEER.—Same objection.

A. Well, probably in the fall. It was put there for the winter snow.

Q. And they were built by the Butters Company?

Mr. HEER.—Same objection.

A. Yes.

Redirect Examination by Mr. HEER.

Q. Mr. Gerrey, in your cross-examination you have described the pipe to which the guy wire was fastened after Mr. Benner's death. Tell us, if you know, how long that pipe had been there before his death.

A. Well, I don't know how long it had been there in the ground.

Q. How long before the date of his death did you know of its being there?

(Deposition of E. C. Gerry.)

Q. If you had considered this line a dangerous one at the time, I understand you say you would have gone and fixed it yourself. Is that correct?

A. I would have, yes.

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Q. Do you remember the last time you saw the guy wire attached to the bolt in the foundation of this mill? A. No, I don't remember.

Q. I don't remember whether I asked you or not when the snowshed was built. Will you kindly state when the snowsheds were built of which you testify?

(Deposition of E. C. Gerry.)

Mr. HEER.—I object to the question first, for the reason that it has been already asked and answered, second, because it is irrelevant, incompetent and immaterial, not tending to prove or disapprove any of the issues of this case, and third, for the reason that it is not proper cross-examination, not touching any matter inquired into upon direct examination.

[163]

A. Well, I don't remember the time when they were built.

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Mr. HEER.—Same objection.

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Q. About how long before Benner's death?

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Q. And they were built by the Butters Company?

Mr. HEER.—Same objection.

A. Yes.

Redirect Examination by Mr. HEER.

Q. Mr. Gerrey, in your cross-examination you have described the pipe to which the guy wire was fastened after Mr. Benner's death. Tell us, if you know, how long that pipe had been there before his death.

A. Well, I don't know how long it had been there in the ground.

Q. How long before the date of his death did you know of its being there?

(Deposition of E. C. Gerry.)

A. I didn't know the pipe was there until the night of the accident when I seen the guy fastened to the pipe.

Q. You don't know whether or not it was there before that time?

A. Yes, it had been there before that.

Q. How long before? A. Well, I don't know.

Q. A minute or a year?

A. Possibly years. When the mill was built the pipe was put there for conveying water to the mill.

Q. With reference to the second conversation between yourself and Mr. Wright about this wire which you say occurred when Mr. Wright was driving over toward the mine—tell us to the best of your recollection as to whether that was before or after the death of Benner.

Mr. HAWKINS.—Object to the question as not being redirect examination.

A. That was when Wright was setting meters I said, but whether it was before or after I can't remember—I think it was before the accident.

Q. Is it to the best of your recollection before?

A. To the best of my recollection.

Q. Give us to the best of your recollection how long it was before.

Mr. HAWKINS.—Object to the question as not proper, or as not being redirect examination.

Q. Just to the best of your recollection, Mr. Gerry, whatever that may be.

A. It would be hard for me to give a date for that as I don't remember how long.

(Deposition of E. C. Gerry.)

Q. Well, you certainly know, Mr. Gerrey, whether it was a minute before or an hour before.

A. Well, it was days, but how many I don't know.

Q. Mr. Gerrey, you testified in your cross-examination that if you had [164] thought the wire was in a particularly dangerous condition you yourself would have fixed it. Did you say anything to Mr. Wright with reference to yourself fixing it?

A. I don't think I did to Mr. Wright, if I remember—I don't remember now if I did. I did to Mr. Stone. The conversation was if it was up to me I would fix it.

Q. Did Mr. Wright ever say anything to you about you fixing it? A. About my fixing it?

Q. Yes. A. Not that I remember.

Q. Was that a part of the electrical equipment of which you had charge at the Chollar mine?

A. This line?

Q. Yes, this line and this pole.

A. Well, I never knew before or after whether this line belonged to the company or who it did belong to. I had no jurisdiction over that particular line.

Mr. HAWKINS.—I would like to move to strike that answer on the ground that it is not proper in re-direct examination. I object to the question for the same reason.

Q. Mr. Gerrey, referring to the first talk you had with Mr. Wright about this wire, tell us as nearly as you can exactly what you said to Mr. Wright about it.

Mr. HAWKINS.—Object to the question as not

(Deposition of E. C. Gerry.)

proper in redirect examination as having been asked about in direct examination.

A. Well, I asked him if Mr. Stone had spoken to him with regard to the line and he said he had and he would look it over.

Q. Did you tell him anything about the condition of the wire or the pole or the guy wire?

A. Well, I don't remember. I mentioned the slackness of the line to him.

Q. Can you remember whether or not you said anything to him about the condition of the line or the pole or the guy wire?

Mr. HAWKINS.—Objected to as not proper redirect examination, having been gone into fully on direct examination.

A. I don't remember what the conversation was except what I stated.

Q. Have you stated all that you can remember of the conversation?

A. That is all I can remember.

Q. You testified, Mr. Gerrey, that wires of that kind between poles are always more or less slack. You have likewise testified that ordinarily a man could sit on the top of that snowshed upright, and his head would pass under that wire. Was that while the wire was slack as they ordinarily are between poles?

Mr. HAWKINS.—Object. It is not redirect examination.

A. That was when the slack first started down. How I knew—that was when the man was building

(Deposition of E. C. Gerry.)

the shed. I saw the carpenter crawling along under [165] the wires, sitting on the gables.

Q. You know that the wire was that high above the shed because you saw men crawling under there when the shed was being built?

Mr. HAWKINS.—Objected to as not redirect examination.

Q. Well, now, at that time—that is when you saw men passing under there during the building of the snowsheds, was the wire sagging as it ordinarily sags between poles?

A. Well, possibly a little slacker than what they usually are.

Q. Do you know whether or not at that time the guy wire was in place?

Mr. HAWKINS.—Objected to as not redirect examination.

A. I don't know if it was or not, no.

Q. You state—"I believe that the wire leading to the rock crusher was fastened to the pole north of the shed." Is that correct? A. The what?

Q. The wire leading to the rock crusher was taken off the pole north of the shed? A. Yes.

Q. Was the connection made north or south of the pole itself, or on the pole itself?

A. On the pole itself.

Q. Which direction did that wire run with reference to the direction that the main wire was running?

A. It was running just opposite, to the east.

Q. At what angle would you say?

(Deposition of E. C. Gerry.)

A. At right angle with the main line.

Q. In one of your statements to Mr. Hawkins, Mr. Gerrey, you used the expression that you were in charge of the Butters Company as its electrician. Is that correct? A. In the mine.

Q. That you were in charge of the Butters Company as its electrician? A. At the mine.

Q. Well, just what did you have charge of?

A. The inside lighting, hoisting, etc., for the Butters Company.

Q. Did you have charge of anything else for the Butters Company?

A. Only our small lines upon the works.

E. C. GERREY.

Subscribed and sworn to before me this 24th day of February, 1912.

[Seal]

SILAS W. MACK,
Notary Public in and for the County of Monterey,
State of California.

Certificate of Notary to Deposition.

State of California,

County of Monterey. [166]

I, Silas W. Mack, a Notary Public in and for the said county and State, duly commissioned and qualified and authorized to administer oaths and take and certify depositions, do hereby certify that the foregoing deposition of E. C. Gerrey was taken pursuant to the attached notice to take deposition; that the said E. C. Gerrey, the witness named in the attached notice to take deposition, appeared before me

at my office in the city of Monterey, County of Monterey and State of California, on the 16th day of February, 1912, at the hour of two o'clock P. M.

That at said time and place there also appeared in the above-entitled cause A. A. Heer of the firm of Mack, Green, Brown & Heer, of counsel for the plaintiff, and Prince A. Hawkins, of the firm of Cheney, Downer, Price & Hawkins of counsel for the defendant; that the said E. C. Gerrey, the witness named in said notice, being of sound mind and of legal age, was before the commencement of the taking of said deposition by me duly and publicly cautioned and sworn to testify to the truth, the whole truth and nothing but the truth, in the above-entitled cause wherein A. S. Benner, as administrator of the estate of Clarence J. Benner, deceased, is plaintiff, and Truckee River General Electric Company, a corporation, is defendant. That said E. C. Gerrey was then and there by the said A. A. Heer, of counsel for plaintiff, and Prince A. Hawkins, of counsel for defendant, orally examined in my presence, and the interrogatories and cross-interrogatories and the answers thereto, by the consent of parties, were taken in shorthand by Maud B. McCormick, and thereafter reduced by her to typewriting in my presence, and, after said deposition had been so reduced to typewriting, the same was read by said witness in my presence and subscribed and sworn to before me by said witness as above set forth.

I further certify that I am neither of counsel nor attorney for either of the parties to the above-en-

titled action nor a relative of either party nor directly or indirectly interested in the event of said cause; and that it being impracticable for me to deliver from my own hands into the court for which it is taken, said deposition, I have retained the same for the purpose of being sealed up and directed with my hand and speedily and safely transmitted to said court for which it was taken, and to remain under my seal until there opened. [167]

And I further certify that said deposition was retained in my own possession exclusively until the same was deposited by me in the United States Post-office at Monterey, California, directed to the clerk of the above-entitled court.

I further certify that my fees for taking and reducing to writing and extending this deposition are thirty and seventy-five hundredths dollars, which amount has been paid to me by the attorneys for the plaintiff.

In witness whereof, I have hereunto set my hand and affixed the seal of my office at Monterey, in the County of Monterey, State of California, this 24th day of February, 1912.

[Seal]

SILAS W. MACK,

Notary Public in and for the County of Monterey,
State of California.

My commission expires on the 11th day of February, 1914.

[Endorsed]: No. 1109. In the District Court of the United States, for the District of Nevada. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee

River General Electric Company, a Corporation,
Defendant. Deposition of E. C. Gerrey. Opened
by Order of Court, of Date April 16th, 1912. Filed
April 16, 1912. T. J. Edwards, Clerk. [168]

Minutes of Court—November 9th, 1912.

No. 1109.

A. S. BENNER, as Admr., etc.,

vs.

TRUCKEE RIVER GEN. ELEC. CO.

On motion and by consent of counsel, Mr. Mack
appearing for the plaintiff, Mr. Hawkins for the de-
fendant, the motion for a new trial was submitted
on briefs, to be filed as follows: The defendant five
days, the plaintiff five thereafter to reply, and the
defendant five days thereafter to reply, or to make
oral argument.

Order Overruling Motion for New Trial.

May 26th, 1913.

No. 1109.

A. S. BENNER, as Admr.,

vs.

TRUCKEE RIVER GEN. ELECTRIC CO.

The motion for a new trial, heretofore argued and
submitted, having been duly considered by the Court,
it is now ordered that the same be, and is hereby, de-
nied.

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1109.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

[Opinion] on Motion for New Trial.

MACK, GREEN, BROWN & HEER, for
Plaintiff.

Mr. W. A. MASSEY and CHENEY, DOW-
NER, PRICE & HAWKINS, for Defend-
ant.

FARRINGTON, District Judge:

The jury in this case found a verdict for the plaintiff in the sum of \$7,000. The motion for new trial is made on thirty-four distinct grounds, only one of which appears to have received serious attention in the briefs. This ground is the fifth, "That the verdict of the jury is excessive, appearing to have been rendered and given under the influence of passion or prejudice."

The evidence very clearly and conclusively shows that the death of [169] plaintiff's intestate was caused by the negligence of the defendant. The action was brought under sections 3683 and 3984 of Cutting's Compiled Laws, which read as follows:

“3983. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the persons who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; and although the death shall have been caused under such circumstances as amount in law to a felony.

“3984. The proceeds of any judgment obtained in any action brought under the provisions of this act shall not be liable for any debt of the deceased; provided, he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of a deceased child; but shall be distributed as follows:

First: If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife, and a child or children, or grandchildren, then, equally to each, the grandchild or children taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or children, then to such child or children and grandchild or children by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sis-

ters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the distribution of the personal property of deceased persons; *provided*, every such action shall be brought by and in the name of the personal representative or representatives of such deceased person; and, *provided, further*, the jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named."

Under the common law, in actions of this character the plaintiff was unable to recover, and the only warrant for recovery in the State of Nevada is such as exists under the statute above quoted.

This statute plainly contemplates pecuniary and exemplary damages. Exemplary damages are to be given when the injuries are inflicted willfully and intentionally, or under such circumstances as to be wanton and reckless; and in awarding damages, pecuniary and exemplary, the statute says the jury "may take into consideration the pecuniary injury resulting from such death to the kindred as herein named." This would seem to imply pecuniary injury other than that which results to the kindred named, to wit, the value of the life itself, based on the earning power of the deceased and his expectancy of life. The statute also contemplates several

classes of beneficiaries, first, the surviving husband or wife, children and grandchildren; second, the brothers and sisters; third, remoter kindred [170] provided for in the law governing the disposition of the personal property of deceased persons; fourth, the State. It provides further that "the proceeds of any judgment obtained * * * shall not be liable for any debt of the deceased; provided, he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of a deceased child." In the event that none of the kindred named survive, it is fair to assume that the creditors are entitled to be paid out of the proceeds of the judgment.

The provision that the jury shall award "such damages, pecuniary and exemplary, as they deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred" named in the statute, and the further provision that "if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons," is not in harmony with the doctrine that the recovery is limited to the actual pecuniary injury suffered by the kindred named in the statute, nor with the further restricted view that the recovery can be only for the pecuniary injury suffered by that group of kindred in whose behalf the suit is brought. If there be no such kindred, no pecuniary injury can have resulted to them from the death.

Why, then, the provision that in the absence of such kindred, the proceeds of such judgment shall be disposed of as the personal property of deceased persons, and why the provision that if the deceased left any of the kindred named in the statute, the proceeds of the judgment shall not be liable for any debt of the deceased? If it were the intention of the legislature that recovery should be restricted to the pecuniary injury suffered by the kindred named, it seems very strange that it was not so stated, instead of saying "the jury in every such action may give such damages, pecuniary and exemplary as they shall deem fair and just."

At plaintiff's request, the jury were instructed as follows:

"9. The Court instructs the jury that if they believe from the evidence, that on the 18th day of August, 1909, Clarence J. Benner came to his death while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended complaint filed herein; and [171] if the jury further believe from the evidence that the death of said Clarence J. Benner was caused by the negligence of the defendant, Truckee River General Electric Company, as charged in the declaration; and if the jury further believe from the evidence that the said Clarence J. Benner left him surviving brothers and sister, as charged in the complaint; and that such brothers and sister, by the death of said Clarence J. Benner, have suffered pecuni-

ary loss, then, in law, the plaintiff is entitled to recover.”

“10. If the jury should find for the plaintiff, the pecuniary value of the life of the deceased to his brothers and sister is to be determined by you from all the evidence in the case, and in this connection you may consider the deceased’s age, condition of health and strength at the time of his death, his capacity for earning money, his occupation, his personal habits, his wages, and all other facts in evidence; and the value is to be fixed at the present worth of the amount which it is reasonably probable the deceased would have contributed to his said brothers and sister, in money, property or services had he lived, during his and their expectancy of life, and of which, in view of all the evidence, they were, in your judgment deprived by the death of Clarence J. Benner.”

These instructions were given to the jury precisely as requested and in order that there should be no misunderstanding on the part of the jury, they were further instructed that they could not award exemplary damages; that A. S. Benner, the father, was not entitled to participate in the proceeds of the judgment; that there could be no recovery for grief or sorrow or injury to the feelings of the relatives; or for the pain or suffering of the deceased; and that the amount fixed by them should consist only of such pecuniary damages as would be the exact equivalent of the injury, if any, sustained by the brothers and

sister of the deceased, as shown by all the evidence in the case.

To these instructions no exceptions were taken by plaintiff.

Whatever my opinion as to the true interpretation of the statute and the measure of damages recoverable in cases of this kind, it seems to me that I am bound by the instructions given at the request of the plaintiff. I cannot now award a more favorable rule than that adopted at plaintiff's request. The pecuniary value of the life of Clarence Benner was not less than \$7,000, probably it was more; but if the law is as plaintiff contends, and as the Court at plaintiff's request instructed the jury, the monetary value of the life cannot be recovered. The amount which can be allowed by the jury is limited to a sum which is equal to the present value of the money, clothing, and other financial assistance which, had Clarence Benner lived, it is probable he would have given his brothers and sister. What that amount is can be determined only by the conditions which existed [172] prior to the accident. He was then contributing toward the expense of his father's household, of which he was a member, between \$40 and \$50 per month. He gave his brother William Benner, then aged twenty-one years, \$10 to \$15 per month, when the latter was not working, and needed it. How often he was out of work and how often he needed assistance, does not appear. During the last year of his life he also gave William Benner between \$40 and \$50 for underclothing. The contributions to his sister, Mrs. Bogel, who

was living with her husband in their own home, amounted to about \$15 per month in cash, and from \$18 to \$28 per month in clothing. It is not within the range of probability that the conditions which existed during the year preceding the death of Clarence Benner would continue indefinitely. Clarence was the youngest of the family. It is not to be assumed that during the whole expectancy of life, about 40 years, he would remain unmarried, and contribute so large a proportion of his earnings to his older brothers, and sister, who at the time of the trial were apparently in good health.

The expectancy of life of William Benner was 42 years, and of Mrs. Bogel about 38 years. It must further be noted that there was nothing in the conduct of the case calculated to rouse any passion or prejudice on the part of the jury. The verdict was less than the amount assessed in many similar cases, where the purpose was to award full pecuniary value for a life ended by wrongful act.

In *Christensen vs. Floriston Pulp & Paper Co.*, 29 Nev. 552, the deceased was a laborer, 32 years of age, earning \$3.00 per day; he had been in this country seven years, and had deposited in bank, at the time of his death \$462.12; he left surviving him a father and mother residing in Denmark, aged respectively 56 and 68 years.

“There was no proof as to the expectancy of life of any of said parties outside of the mere fact of their ages, to which, of course, the jury could apply their general knowledge. There was no proof whatever of the condition of health

of either of said beneficiaries nor of the decedent, [173] except that which might be gleaned from the fact of his being able to engage in remunerative employment. There is no proof from whence deceased derived the money left by him in the bank—whether it was savings from his wages, or was derived from some other source, is purely speculative. There is no proof that during his seven years of residence in this country he ever contributed a dollar to the support of his parents, or ever made them a gift of money or anything of value, nor is there any proof that the parents of decedent were ever in need of assistance from decedent or likely to be in need of such. In fact, there is no evidence whatever of their condition, either present or prospective, in the case. There is, however, no presumption that the parents are possessed of property sufficient to support them in their declining years.” (Page 576.)

The Supreme Court of Nevada held that a judgment for \$10,000 was excessive, and that a new trial should be granted unless the respondent consented to reduce the judgment to \$3,000. In brief, in the Christensen case the deceased was earning but \$3.00 per day, had an expectancy of about 35 years, and had never contributed anything to the beneficiaries, whose expectancy of life did not exceed 15 years, and who were not shown to be in need of assistance.

In the Benner case the deceased was earning \$4.00 per day, his expectancy of life was about 41 years, and he contributed \$50 or more per month to the

beneficiaries whose expectancy of life was not less than 36 years.

If \$3,000 was a reasonable amount to be awarded in the Christensen case, it could not well be said that \$7,000 in the Benner case was so excessive that it must have been rendered under the influence of passion or prejudice. \$7,000 is more than I should have awarded under the instructions, but it is less, in my judgment, than the pecuniary value of the life of Clarence Benner. However, it is the judgment of the jury, not of the Court, as to what is just and fair, which the statute requires.

The motion for a new trial is overruled.

Costs. Motion has been made by the defendant to retax the costs. The costs of the first trial were properly chargeable against the defendant. If the prior verdict had been set aside because of the misconduct or misbehavior of the plaintiff, there would be more reason for taxing the costs of the first trial to the plaintiff, but the error was in the instructions to the jury, for which the plaintiff is in nowise legally responsible.

This position is amply supported by the following authorities:

Visher vs. Webster, 13 Cal. 58, 60; Stoddard vs. Treadwell, 29 Cal. 281; Fitch vs. Stevens, 2 Met. 506; Cregin vs. Brooklyn Cross Town R. R. Co., 19 Hun, 349; Berrent vs. Simpson, 113 N. Y. Supp. 1065; 115 [174] N. Y. Supp. 693; Palmer vs. Palmer, 97 Ia. 454; Carvey vs. Rider, 2 Cow. (N. Y.) 617; Den vs. Morris, 3 Halsted, 213.

It is objection that the witness fees allowed for R. B. Henricks, who attended court under subpoena but was not called to the stand, should not be allowed. It is not shown why Henricks was not called, what he was expected to prove, or that his presence was necessary. In the absence of such a showing, it must be held, under authority of *State vs. Gayhart*, 26 Nev. 278, 280, that this item cannot be allowed.

In *Simpkins vs. Atchison etc. R. R. Co.*, 61 Fed. 999, Judge Philips held that where persons are subpoenaed as witnesses, but not introduced to testify, the presumption is they were unnecessarily brought to Court, and their fees are not taxable against the opposite party. This principle will naturally throw upon the party calling such a witness the burden of proving he was necessarily and properly brought into Court.

The order of the clerk allowing \$30.75 notary's fees for taking the deposition of E. C. Gerrey at Monterey, California, is also approved. The deposition contained 99 folios. It is contended by defendant that the allowance for this should not exceed ten cents per folio, which would be \$9.90, instead of \$30.75. Under the Federal statute United States Commissioners are allowed ten cents, and clerks twenty cents per folio for certifying depositions to file in civil cases. The amount allowed United States Commissioners is fixed under the Act of May 28, 1896, Vol. 4, Fed. Stats. Ann., at page 147. This, in terms, only applies to United States Commissioners, but Judge Newman held in the case entitled *United States vs. Venable Const. Co.*, 158 Fed. 833,

835, that where persons other than United States Commissioners were named to take depositions, the Clerk might adopt the rate allowed clerks for filing depositions, instead of the rate allowed Commissioners. In *Kitchen vs. Parker*, 27 Fed. 480, Judge Benedict said:

“In the absence of evidence showing the existence at the place of executing a *commissioner* to take testimony of a customary rate of charges for services rendered by the commissioner in executing the commission, or for like services, I am of the opinion that proof of the fact that the sum actually paid the commissioner is a reasonable sum to pay for like work at the place of payment will warrant the allowance of the item as a disbursement properly made to secure the execution of the commission.”

In this case it does not appear that there is a United States Commissioner at Monterey. The Political Code of California, sec. 798, fixes the fees [175] of notaries public for taking depositions at 30 cents a folio. The notary who took the deposition in this case was entitled to charge the legal rate for his services, and could refuse to take the deposition unless such compensation were actually paid. The statute of California has thus fixed what is a reasonable fee for taking this deposition, and it should be followed.

The amount allowed by the Clerk is therefore approved.

[Endorsed]: No. 1109. In the District Court of the United States, in and for the District of Nevada.

292 *Truckee River General Electric Company*

A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Opinion on Motion for New Trial. Filed May 26th, 1913. T. J. Edwards, Clerk. [176]

*In the District Court of the United States, for the
District of Nevada.*

No. 1109.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of
the District Court aforesaid.

Now comes Truckee River General Electric Company, a corporation, by its attorneys, and respectfully shows: That on the 18th day of April, A. D. 1912, a jury duly empanelled found a verdict and assess the damages in the sum of \$7,000 against your petitioner and in favor of A. S. Benner, as administrator of the estate of Clarence J. Benner, deceased, plaintiff above named, and upon said verdict, a judgment was entered; that by order of the above entitled court, jurisdiction over said cause, beyond the February term, 1912, was continued and execution

upon said judgment was stayed by order of the above-entitled Court for a period of forty-two days from the date of the entry of said judgment, in order to give the defendant above named, time to file its petition or motion for a new trial; that on May 27, 1912, a motion or petition for a new trial was filed herein, which was thereafter argued and submitted; that thereafter, and on May 26, 1913, said motion or petition for a new trial was overruled, and upon said verdict a final judgment was entered on the 26th day of May, A. D. 1913, against your petitioner, defendant above named.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon, as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals, aforesaid, sitting at San Francisco, State of California, [177] in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the said United States Cir-

cuit Court of Appeals for the Ninth Circuit.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Petitioner in Error.

Writ of Error granted; and Supersedeas Bond fixed at \$10,000, and, upon said bond being given by the defendant, conditioned as the law directs, all further proceedings will be suspended until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 4th day of June, A. D. 1913.

E. S. FARRINGTON,

Judge United States District Court.

[Endorsed]: No. 1109. In the District Court of the United States for the District of Nevada. A. S. Benner, as Admr., etc., Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Petition for Writ of Error, and Order Made Thereon. Filed this 4th day of June, 1913. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Defendant.

*In the District Court of the United States, for the
District of Nevada.*

No. 1109.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the above-named Truckee River General Electric Company, a corporation, plaintiff in error in the above numbered and entitled cause, and in connection with its petition for a writ of error in this cause, [178] assigns the following errors, which plaintiff in error avers occurred upon the trial thereof, and upon which it relies to reverse the judgment entered herein, as appears of record:

I. That the Court erred in overruling the demurrer to the amended complaint filed in this cause and in the above-entitled Court.

II. That the Court erred in allowing and in permitting plaintiff, over the objection of defendant interposed at the time, to amend the amended complaint, in both and each of the particulars, as shown by the record and designated therein as "First Amendment to Complaint proposed to follow paragraph X" and "Second Amendment to Complaint to follow First Amendment to paragraph X" for the

following reasons:

1. Because plaintiff did not file or serve with either of said amendments any affidavit showing good cause for the allowance of same or either thereof, in accordance with section 68 of the Civil Practice Act of the State of Nevada.

2. Because said amendments alleged a new and different cause of action; and, as allowed, the cause of action is changed to such an extent as to be a departure from law to law, and a departure from fact to fact.

3. Because the cause of action as alleged in the amended complaint, *is* any is stated therein, is a liability fixed by law, based upon the existing relation of the parties, and the amendments to the amended complaint is a departure and change from that cause of action, and one based upon the contractual relation, express or implied, existing between the deceased and A. S. Benner, and whatever damages are liable under the new cause of action are based upon changed conditions as to the relations existing between the deceased and the brothers and sister of the deceased claiming to have received support or contributions from him during his lifetime. Because the amended complaint, which is sought to be amended by the said two amendments, does not state facts sufficient to constitute a cause of action, and there is, therefore, no valid pleading on file which can be amended.

III. The Court erred in overruling the demurrer to the amended complaint as amended by the two separate amendments allowed and filed in this cause

in the above-entitled Court—for the reason assigned in said demurrer. [179]

IV. The Court erred in overruling the motion interposed by defendant, at the close of plaintiff's evidence to dismiss the action for the following reasons:

1. That plaintiff's evidence fails to establish that the death of Clarence J. Benner was caused by the wrongful act, neglect or default of defendant, and fails to establish that the death of said Benner was caused by any actionable negligence of defendant.

2. That plaintiff's evidence fails to establish that Clarence J. Benner, at the time of his death, had been emancipated.

3. That plaintiff's evidence fails to establish that the brothers, or either of them, or the sister of Clarence J. Benner, deceased, sustained any damage, for which recovery could be had, by reason of, or on account of, the death of said Clarence J. Benner.

4. That plaintiff's evidence affirmatively establishes that, at the time of his death, deceased was a minor and under no legal obligation to support or contribute, in any degree, to the support of his said brothers, or either of them or of his said sister; and that deceased was, at the time of his death, not emancipated, but was living with his father, who was entitled to the earnings of deceased, and the money or property received by the brothers and sister of deceased was the money and property of the father of deceased, and was contributed, as shown by the evidence, with the knowledge and consent of said father to his children, who were brothers and sister of deceased.

5. That plaintiff's evidence fails to establish that deceased ever contributed anything for the support of his brothers or sister, or either of them, but that any such sum contributed, as shown by the evidence, in money or otherwise, was the property of the father, and not the property of the deceased, same being the wages, as shown by the testimony, of Clarence J. Benner, deceased, who was a minor, which belonged, at that time, to the father.

6. Because the father, A. S. Benner, had not been damaged in any sum or to any extent by the death of his son, Clarence J. Benner, in that, under the statute in such case made and provided, the father is not a beneficiary of any judgment which might be recovered in this action; because the father, A. S. Benner, is not suing to recover, in this action, any loss of wages caused by the death of his son, and is not claiming any damages therefor, and is not [180] claiming any damages in this action of any kind or character for, or on account of the death of his son, said Clarence J. Benner, deceased.

7. That plaintiff's evidence fails to show that the brothers, or either of them, or the sister of said Clarence J. Benner, deceased, have been damaged by reason of any alleged wrongful act, neglect or default of defendant or by reason of the death of said Clarence J. Benner, deceased.

8. That plaintiff's evidence fails to show, and there is no evidence showing or tending to show, that the brothers, or either of them, or the sister of deceased could reasonably expect to continue to receive any pecuniary benefit from the deceased, or

any benefit whatever; and there is no evidence showing or tending to show that the deceased was accumulating, or was likely to accumulate, any estate, so that said brothers and sister, or either of them, as heirs of said Clarence J. Benner, deceased, would suffer or could suffer any damage or loss on that account.

9. That there is no evidence upon which the jury can fix any damages for the brothers, or either of them or for the sister of deceased, by reason of, or on account of, the death of said Clarence J. Benner; and any damages fixed or assessed by the jury for the brothers, or either of them, or for the sister of deceased, would be and is based purely upon guess or speculation, in that, under the evidence, there is no basis of damages sustained, upon which to make any finding of damages whatsoever.

10. That under the pleadings in this cause, in the absence of proof of emancipation of the deceased by his father, the father would have the right only to recovery for any earnings of deceased, which may have been caused by his death, which right would end upon Clarence J. Benner's arriving at his majority, and death *having shown* to have occurred before such majority, the father's right to recovery would be limited only to that extent, and he is not, in this cause, suing to recover for loss of wages, or for any damages therefor.

11. That it appears from the evidence that the death of Clarence J. Benner was caused by the wrongful act, neglect or default of his employer, Charles Butters Company, Limited, in failing to

furnish to said Clarence J. Benner a safe place in which to work. [181]

V. The Court erred in refusing to give defendant's requested instruction No. 1, which reads as follows: "I instruct you to return a verdict for the defendant" for the following reasons:

1. Because it has not been shown by the evidence that the death of Clarence J. Benner was caused by any wrongful act, neglect or default or actionable negligence of the defendant.

2. Because the evidence shows that the death of Clarence J. Benner was caused by his own contributory negligence.

3. Because the evidence fails to show that Clarence J. Benner, at the time of his death, had been emancipated from any obligation for the relation he might sustain under the law to his father, A. S. Benner; and that his brothers and sister, or either of them, have not, therefore, been damaged to any extent or in any manner, in that, in the absence of emancipation, any sums of money advanced or contributed by deceased to any of his brothers, or sister, under the evidence, would be an advancement or contribution from the father, who was entitled to, and the owner of, the wages of said deceased, not the contributions of deceased himself.

4. Because the evidence fails to show that said Clarence J. Benner ever contributed anything of his own, or belonging to him, to his brothers or sister, or either of them.

5. Because, under the allegations in the amended complaint under the evidence, Clarence J. Benner,

at the time of his death, was a minor, and the father, A. S. Benner, was, therefore, entitled to all of the wages of said deceased, and in the absence of evidence showing emancipation, the wages of deceased belonged to the father, A. S. Benner, and that any and all contributions, alleged or shown to have been made to the brothers, or either of them, or to the sister of deceased, were made and given with the knowledge or consent and permission of the father, A. S. Benner, and were therefore not contributions on the part of Clarence J. Benner, deceased.

6. Because, in this cause, no damages can be awarded to the plaintiff for or in behalf of A. S. Benner, father of the deceased, under the instructions of the Court and the pleadings, for the reason that no claim is made and no claim can be made for damages, on account of the death of said Clarence J. Benner, deceased.

7. Because under the allegations in the pleadings, and under the evidence, deceased [182] was under no legal obligation to support or contribute to the support in any way or manner, of his brothers or either of them, or of his sister, and the evidence fails to show that the brothers, or either of them, or the sister of deceased have suffered damage to any extent or in any amount by reason of the death of said Clarence J. Benner.

8. Because it appears from the evidence that the death of Clarence J. Benner deceased was caused by the wrongful act, neglect or default of Charles Butters Company, Limited, the employer of the said Clarence J. Benner, deceased, at the time of his

death, in that said employer failed to furnish to said deceased a reasonable safe place in which to work, it appearing from the evidence that the managing officers or employees of said Charles Butters Company, Limited, were well aware and knew of the conditions surrounding said snowshed and the wire suspended above said snowshed, for some time prior to the time of the contact between said wire and said snowshed causing the death of said Clarence J. Benner, deceased, as shown by the testimony of both Sidney M. Stone, who was, at the time, Manager of Charles Butters Company, Limited, and also the testimony of E. C. Gerrey, who was, at the time of the death of said Clarence J. Benner, employed by said Charles Butters Company Limited, as electrician.

VI. The Court erred in refusing to give defendant's requested instruction No. 3 which reads as follows: "There is no evidence in this action tending to prove whether the said Clarence J. Benner, deceased, in his lifetime was in the habit of saving his money, or whether he ever accumulated any estate or property, or whether he ever contributed to the support of his brothers or sister, or either of them, or whether his said brothers or sister, or either of them, ever had any reasonable expectation of receiving aid from him. Therefore, if you find a verdict in favor of the plaintiff, you must limit the amount of damages to a merely nominal sum," for the following reasons:

1. Because it is established by the evidence, (a) That deceased, at the time of his death, was a minor,

living with his father, the mother having died several years previous; (b) that deceased, at the time of his death, had not been emancipated; (c) that all amounts of money given to or clothing purchased for either brother or sister of deceased, by said Clarence J. Benner in his lifetime, was so furnished or purchased with the permission and consent of said A. S. Benner, the father of both the deceased and the other brothers and sister of deceased, who received [183] the money or clothing.

2. Because there is no evidence, showing or tending to show, that deceased, in his lifetime, was in the habit of saving any part of his earnings, or whether he ever accumulated any money, property or estate, which his brothers and sister, as next of kin, would have inherited, or whether deceased ever contributed to the support of his brothers or sister, or either of them, or whether his said brothers or sister, or either of them, ever had any reasonable expectation of receiving aid from him.

3. Because there is no evidence showing that the brothers, or either of them, or the sister of deceased suffered or sustained any pecuniary damage by reason of, or on account of the death of their brother, Clarence J. Benner.

VII. The Court erred in refusing to give defendant's requested instruction No. 7, which reads as follows: "It is alleged in the complaint and has not been denied, that the deceased was at the time that he met his death engaged as a miner in the employ of the Charles Butters Company, Limited: I therefore instruct you that it was the duty of the

Charles Butters Company, Limited, to provide for said Clarence J. Benner while engaged in its employment, a safe place in which to work; and if you find that the said Charles Butters Company, Limited, failed to furnish the said Clarence J. Benner a safe place to work, and that by such failure or neglect Clarence J. Benner was killed, then I instruct you that his death was caused by the negligent act of said Charles Butters Company, Limited, and you may take that matter into consideration in arriving at your verdict in this action, for the following reasons:

1. Because under the allegations in the amended complaint and under the evidence introduced, it appears that deceased was, at the time of his death, in the employ of Charles Butters Company, Limited; and it appears from the evidence that for some days prior to the time of the death of said Clarence J. Benner, it came to the knowledge of said Charles Butters Company, Limited, that the snowshed, in which said Clarence J. Benner came to his death, was located under or beneath the electric power line and that said power line was sagging and approaching nearer and nearer to the crest of the corrugated iron roof, covering said snowshed, and that said Charles Butters Company, Limited, failed in its duty to Clarence J. Benner, its employee, to furnish said Clarence J. Benner a safe place in which to work; it appearing from the evidence that it was the habit and custom of said Clarence J. Benner and other employees of said Charles Butters Company, Limited, to use said snowshed as a passageway and

as a place for eating their lunch. [184]

VIII. The Court erred in refusing to give defendant's requested instruction No. 11, which reads as follows: "I further instruct you that when a child is under age, the parents have a right to his earnings, and may therefore sue for the loss experienced by his death, but this right ends when he maintains his majority, and, if death occurs before that, a recovery is limited in consequence to his probable earnings up to that time; the chance of survivorship, his ability and willingness, after he should become of age, to support others, being too vague, as is declared, to enter into an estimate of damages merely compensatory," for the following reasons:

1. By the first amendment to the amended complaint and the amendment to the answer, the issue of emancipation by plaintiff of his son, Clarence J. Benner, deceased, is made. The only evidence furnished on behalf of plaintiff to establish the allegation of emancipation is in the testimony of A. S. Benner, at pages 106, 108, 109 and 110, examination in chief, and at pages 115 and 116, cross-examination, in the bill of exceptions, the substance of which testimony is: That deceased contributed from \$40 to \$50 per month to the household expenses of his father, A. S. Benner, with whom deceased and two other brothers were living at the time of deceased's death; that the balance of the expense of said household was contributed by the other two brothers, the total expenses being about \$80 or \$90 per month; that A. S. Benner, the father, did not receive from deceased the balance of deceased's wages, but did

know what deceased was doing with his wages; that deceased brought in money to the father, under the same conditions from the time he began to work up to the time of his death. That as to the control exercised over the deceased by said A. S. Benner, the father, said A. S. Benner also testified at the places above mentioned, in substance as follows: that outside of the working hours of deceased, he did not know whether or not anybody exercised any control or direction over the goings or comings of the deceased; that deceased was working every day, and the father would get up and get the breakfast, the deceased would go to work, come home, and if he was going out, he would tell witness where he was going, and what time he would come in. This same condition and state of facts continued without change from the time deceased started in to work as a 15 or 16-year old boy, and continued up until the time of his death.

2. That, under the pleadings and the issues made thereby, and the evidence offered by plaintiff, and [185] admitted over the objection of the defendant, said defendant's requested instruction No. 11, was a correct statement of the rule of law, in so far as the relation of the father and son is concerned; and also was a correct statement of the rule of law in so far as the brothers, or either of them, or the sister of deceased were entitled to recover in this action on account of the change of survivorship, the ability and willingness of the deceased to continue to work, his willingness after majority to work or to contribute, and the question as to whether or not

he should thereafter marry and become the head of a family, and be required under his legal obligations, to support said family, being too vague to enter into an estimate of damages merely compensatory.

IX. The Court erred in refusing to give defendant's requested instruction No. 12, which reads as follows: "I instruct you that Charles Ed Benner and George C. Benner and Will Benner, and each of them, brothers of Clarence J. Benner, deceased, are not, nor is either of them, entitled, and will not be entitled, to participate in the proceeds of any judgment which may be rendered in favor of the plaintiff herein, and they are not, nor is either of them, to any extent, under the facts of this case, a beneficiary of any judgment obtained herein, by reason of the death of the said Clarence J. Benner. I therefore instruct you that in determining the amount of damages, if any, to which the plaintiff is entitled in this case, you will not consider any loss or damage which the said Charles Ed Benner, George C. Benner and Will Benner, brothers of said deceased, have or has sustained by reason of the death of said Clarence J. Benner, if you do find that his death was caused by the negligence of the defendant in this action," for the following reasons:

1. Because there is no evidence upon which to base any finding that anything was ever contributed by the deceased to the brother Charles E. Benner, during the life of deceased; because there is no evidence upon which to base any finding that anything was ever contributed by the deceased to the brother George C. Benner, during the life of deceased; be-

cause there is no evidence upon which to base any finding that anything was ever contributed by the deceased to the brother William H. Benner, except that certain sums of money were furnished to said William H. Benner by deceased for the purpose, as expressly testified to, of relieving him, the said William H. Benner, of the stress caused by the violation of the Virginia & Truckee Railroad Company to give to said William H. Benner continuous employment during a certain period before the death of said Clarence J. Benner.

X. The Court erred in refusing to give defendant's requested instruction [186] No. 13, which reads as follows: "I further instruct you that if you find for the plaintiff in this case, then the amount to be fixed by you shall consist only of such pecuniary damages which would be the exact equivalent of the injury, if any, sustained by Mrs. Charles Bogel, sister of the deceased, as shown by all the evidence in this case by reason of the death of the said Clarence J. Benner," for the following reasons:

1. Because, if there is any testimony whatever of any expectancy, or right of expectancy, so far as contributions were concerned, from the deceased in after years to the sister, that such expectancy was limited to her alone by the evidence, and that she would have no right to recover anything on that account except the exact equivalent of what might have been the loss to her by reason of the death of said Clarence J. Benner, in case such death should have been caused by the wrongful act, neglect or default of the defendant.

XI. The Court erred in giving plaintiff's requested instruction No. 4, which reads as follows: "It is the duty of an electric company owning, maintaining and using electric wires charged with a deadly or dangerous current of electricity to furnish, as nearly as possible, perfect protection to those who may have occasion to use or be near the same," over the objection and exception of defendant taken at the time, and for the reasons assigned in the objection and exception as appears in the record.

XII. The Court erred in giving plaintiff's requested instruction No. 5, which reads as follows: "The care, protection and diligence required of the owners or users of electric currents and wires charged with electricity varies with the danger which might be incurred by negligence. The greater the degree of danger, the greater the degree of care required," over the objection and exception of defendant, taken at the time, for the reasons assigned in the objection and exception, as appears in the record.

XIII. The Court erred in giving plaintiff's requested instruction No. 4, which reads as follows: "In all cases where electric wires carry or may carry strong and dangerous currents of electricity, and the result of negligence might expose to death or serious injury any person who may be lawfully in proximity of the wires or liable to come in contact with them, a high degree of care and diligence to avoid said results is required," over the objection and exception of defendant, taken at the time, and

for the reasons assigned in the objection and exception, as appears in the [187] record.

XIV. The Court erred in giving plaintiff's requested instruction No. 7, which reads as follows: "Corporations can only act through their officers, agents and employees, within the scope and sphere of their employment. The acts of such employees, agents and officers within the scope and sphere of their employment, are, in a legal sense, the acts of the corporation, such acts as the corporation itself would do, or is empowered to do, and for which the corporation is liable," over the objection and exception of defendant, taken at the time, and for the reasons assigned in the objection and exception, as appears in the record.

XV. The Court erred in giving plaintiff's requested instruction No. 8, which reads as follows: "The Court instructs the jury, that, if you believe from the evidence that the defendant was notified that the wires were in such condition as to be a cause of danger to those who might lawfully be near them, and failed to take immediate steps to investigate and rectify such condition, if the same existed, and if a sufficient length of time between such notice to the defendant and the accident to plaintiff for such investigation and correction had elapsed, and thereafter, by reason of the failure of the defendant to attend to its said wire, such wire or wires charged with electricity hung suspended over the scene of the accident so as to become dangerous to persons lawfully near the same, then the defendant would be guilty of negligence," over the objection and excep-

tion of defendant, taken at the time, and for the reasons assigned in the objection and exception as appears in the record.

XVI. The Court erred in giving plaintiff's instruction No. 9, which reads as follows: "The Court instructs the jury, that, if they believe, from the evidence, that on the 18th day of August, 1909, Clarence J. Benner came to his death while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended complaint filed herein; and if the jury further believe from the evidence that the death of said Clarence J. Benner was caused by the negligence of the defendant, Truckee River General Electric Company, as charged in the declaration; and if the jury further believe from the evidence that the said Clarence J. Benner left him surviving brothers and a sister, as charged in the complaint; and that such brothers or sister, by the death of said Clarence J. Benner, have suffered pecuniary loss, then, in law, the plaintiff is entitled to recover," over the objection and exception of defendant, taken at the time, and for the reasons assigned in the objection and exception, as appears in the record.

XVII. The Court erred in giving plaintiff's requested instruction No. 10, which reads as follows: [188] "If the jury should find for the plaintiff the pecuniary value of the life of the deceased to his brothers and sister is to be determined by you from all the evidence in the case, and in this connection you may consider the deceased's age, condition of health and strength at the time of his death, his

capacity for earning money, his occupation, his personal habits, his wages, and all other facts in evidence; and the value is to be fixed at the present worth of the amount which it is reasonably probable the deceased would have contributed to his said brothers and sister in money, property or services, had he lived, during his and their expectancy of life, and of which, in view of all the evidence, they were in your judgment, deprived by the death of Clarence J. Benner," over the objection and exception of defendant, taken at the time, and for the reasons assigned in the objection and exception, as appears in the record.

XVIII. That the Court erred in permitting the witness, A. S. Benner, the administrator and father of Clarence J. Benner, deceased, to testify that said deceased, before his death paid any part of the expenses of maintaining the home of said witness, in which said witness and three of his children were living; and in permitting the said witness to testify that he did not receive all the earnings of deceased, a minor son of said witness, over the objection of defendant, as shown by the record, and for the following reasons; that it is alleged and admitted in the pleadings and established by the evidence that deceased, at the time of his death, was a minor son, living with his said father; and the evidence fails to establish that deceased had been emancipated, and therefore, the wages of deceased were the property of, and belonging to, the father, A. S. Benner.

XIX. That the Court erred in permitting the witness, Mrs. Charles Bogel, sister of the deceased,

to testify that said deceased had contributed to her support, over the objection of defendant, as shown by the record, and for the reasons: that it is alleged and admitted in the pleadings and established by the evidence that deceased, at the time of his death, was a minor son, living with his father, A. S. Benner; that the evidence fails to establish that deceased had been emancipated, and therefore the wages of deceased were the property of and belonging to, the father, A. S. Benner; and for the further reason that it appears in the testimony of said witness, Mrs. Charles Bogel, that at all times mentioned, when she was receiving said contributions, as testified to by her, she was a married woman, living with her husband, and maintaining her own home, [189] separate and apart from that of her father and her deceased brother, Clarence J. Benner.

XX. That the Court erred in permitting the witness, William H. Benner, brother of said deceased, to testify that the deceased had contributed to the support of said witness, over the objection of defendant, as shown by the record; for the reasons that it is alleged and admitted in the pleadings and established by the evidence that deceased, at the time of his death, was a minor son, living with his father, A. S. Benner; and the evidence fails to establish that deceased had been emancipated, and therefore the wages of deceased were the property of, and belonging to, the father, A. S. Benner; and for the further reason that it appears in the testimony of said witness William H. Benner that he was a minor at the time of the death of said Clarence J. Benner;

and that the contributions so testified as having been made by deceased to said witness, were made for the reason that he, said William H. Benner, did not, at the time, have steady employment; and for the further reason that it appeared at the trial that said William H. Benner had, since death of said Clarence J. Benner, married and was maintaining his own home, separate and apart from that of his father, A. S. Benner.

XXI. The damages awarded by the verdict of the jury are excessive.

XXII. The verdict of the jury is contrary to the law, for the following reasons:

1. That the damages awarded by the verdict of the jury are excessive, because the sole beneficiaries in this cause are collateral relatives, viz., three brothers and a sister; there is no evidence to sustain the verdict; the evidence shows that deceased never contributed anything to the support of the older brothers, and the contributions to the brother William H. Benner were made upon the basis as testified to by said William H. Benner that he did not have regular and constant employment and that the amount contributed by the deceased was when he was not working and needed it, and amounted to the sum of from \$10 to \$15 per month in money and from \$40 to \$50 for clothing during the entire year; the evidence shows that the amount contributed to the sister was, according to her testimony, about \$15 in money and between \$18 and \$28 in clothes per month.

2. That the verdict is in direct violation and dis-

regard of [190] the instructions given by the Court, in part reading as follows:

“Generally there are two classes of damages which may be considered in cases of this character, pecuniary damages and exemplary damages. Pecuniary damages are the precise measure of the injury done. Exemplary damages have no special reference to the amount or the exact measure of the injury, but are imposed as punishment for the commission of a willful injury, or for wanton disregard of duty.

If you find for the plaintiff in this case the amount to be fixed by you should consist only of such pecuniary damages as would be the exact equivalent of the injury, if any, sustained by the brothers and sister of the deceased, as shown by all the evidence in this case, by reason of the death of Clarence Benner.

You cannot award to the plaintiff in this action exemplary damages by way of punishment or as smart money for defendant's negligence, if any, in causing the death of Clarence Benner.

A. S. Benner, the father of Clarence Benner, deceased, is not entitled and will not be entitled, to participate in the proceeds of any judgment which may be rendered in favor of the plaintiff herein, and is not to any extent, under the facts of this case as set out in the complaint, a beneficiary of any judgment obtained herein, by reason of the death of Clarence Benner. I therefore instruct you that in determining the amount of damages, if any, to which the plaintiff is entitled in this case, you will not

consider any loss or damage which the said A. S. Benner, father of said deceased, has sustained by reason of the death of the said Clarence J. Benner, if you do find that his death was caused by the negligence of the defendant in this action.

You cannot award the plaintiff, if you find the plaintiff is entitled to recover, any damages for grief or sorrow, or pain of mind, or injury to his feelings, or for such grief or sorrow, or pain of mind or injury to the feelings of any of the brothers or sister of said Clarence J. Benner, deceased; neither can you award in this action, if you find plaintiff has been damaged, any damages for any pain or suffering, or for the loss of the comfort or protection of the deceased to said plaintiff, or any of the beneficiaries therein named, on this account; neither can you award any damages to said plaintiff on account of any pain or suffering of said deceased, caused by any act or negligence of defendant."

XXIII. The verdict of the jury is not sustained by the evidence:

1. The verdict of the jury, upon all the evidence, should have been in favor of defendant.

2. The verdict of the jury, if for the plaintiff, should have been only for nominal damages—for the reason that the evidence does not establish that the beneficiaries named in the statute have suffered any pecuniary injury by reason of the death of their brother, Clarence J. Benner.

3. The evidence fails to establish that the death of Clarence J. Benner was caused by the wrongful act, neglect or default of defendant.

4. The evidence does establish that the death of Clarence J. Benner was caused by the failure of his employer, Charles Butters Company, Limited, to provide a safe place for its employees, and particularly for its employee, Clarence J. Benner, deceased, to work.

5. There was no evidence that plaintiff had been damaged in the sum awarded by the jury or in any other sum by reason of the death of Clarence J. Benner. [191]

WHEREFORE defendant, plaintiff in error, prays that the judgment of said Court be reversed.
CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1109. In the District Court of the United States for the District of Nevada. A. S. Benner, Admr. etc., Plaintiff, vs. Truckee River General Electric Company, a Corp., Defendant. Assignment of Error. Filed this 4th day of June, 1913. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Plaintiff in Error.

[Bond on Writ of Error.]

*In the District Court of the United States, for the
District of Nevada.*

No. 1109.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,
vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

KNOW ALL MEN BY THESE PRESENTS,
that we, Truckee River General Electric Company,
a corporation, as principal, and H. G. Humphrey
and A. G. Fletcher, as sureties, are held and firmly
bound unto A. S. Benner, as administrator of the
estate of Clarence J. Benner, deceased, the plain-
tiff above named, in the full and just sum of Ten
Thousand (\$10,000) Dollars, to be paid to the said
A. S. Benner, as administrator of the estate of Clar-
ence J. Benner, deceased, or to his executors or ad-
ministrators, to which payment well and truly to be
made, we bind ourselves, our successors, assigns, ex-
ecutors and administrators, jointly and severally by
these presents. Sealed and dated this, the 4th day
of June, A. D. 1913.

Whereas, lately, at a regular term of the District
Court of the United States, for the District of Ne-
vada, sitting at Carson City, in said District, in a
suit pending in said court between A. S. Benner, as

administrator of the estate of Clarence J. Benner, deceased, as plaintiff, and [192] Truckee River General Electric Company, a corporation, as defendant, cause No. 1109 on the law docket of said Court, final judgment was rendered against the said Truckee River General Electric Company, a corporation, for the sum of \$7000.00, with interest thereon at the rate of seven per cent per annum, and the said Truckee River General Electric Company, a corporation, has obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment of said Court in the aforesaid suit, and a citation directed to the said A. S. Benner, as administrator of the estate of Clarence J. Benner, deceased, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, in the State of California, according to law, within thirty days from the date hereof.

Now, the condition of the above obligation is such, that if the said Truckee River General Electric Company, a corporation, shall prosecute its writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation.

By GEO. A. CAMPBELL,
Its Manager.

H. G. HUMPHREY,
Surety.

A. G. FLETCHER,
Surety.

State of Nevada,
County of Washoe,—ss.

H. G. Humphrey and A. G. Fletcher, being duly sworn, upon their oaths depose and say, each for himself and not one for the other; that he is one of the sureties named in the foregoing writ of error bond; that he is worth the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

H. G. HUMPHREY.

A. G. FLETCHER.

Subscribed and sworn to before me this 4th day of June, A. D. 1913.

[Seal]

J. W. DAVEY,

Notary Public. [193]

Approved this 4th day of June, A. D. 1913.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 1109. In the District Court of the United States for the District of Nevada. A. S. Benner, as Admr., etc., Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Writ of Error Bond. Filed this 4th day of June, 1913. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Defendant. [194]

*In the District Court of the United States for the
District of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Notice of Motion and Petition for a New Trial.

To the above-named Plaintiff, and to Mack, Green,
Brown & Heer, and Gray Mashburn, His At-
torneys:

Please take notice that the above-named defend-
ant intends to move the above-entitled court for an
order herein setting aside the verdict of the jury
heretofore rendered herein and granting to defend-
ant a new trial herein upon the motion and petition
and for the grounds stated in the petition and
motion, a copy whereof is hereunto attached.

That said motion will be made upon this notice of
motion and petition for a new trial, and said motion
and petition for a new trial, the minutes of the Court,
and upon all the pleadings and records of the above-
entitled action on file in the Clerk's office, and upon
a proposed bill of exceptions.

W. A. MASSEY,
CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Defendant.

*In the District Court of the United States for the
District of Nevada.*

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Motion and Petition for a New Trial.

[195]

Now comes the above-named defendant, and moves and petitions the above-entitled court to enter an order herein, setting aside the verdict of the jury heretofore rendered herein, and granting to defendant a new trial herein, for the following reasons:

1. That said verdict was not sustained by sufficient evidence.

2. That there was no testimony tending to sustain the verdict of the jury.

3. That the verdict of the jury was against the weight of, and contrary to the evidence.

4. That the verdict of the jury was contrary to the law.

5. That the verdict of the jury is excessive, appearing to have been rendered and given under the influence of passion or prejudice.

6. That the verdict of the jury is contrary to law in this: a. Because the evidence is not sufficient to sustain the verdict. b. Because the verdict is con-

trary to, and against, the weight of evidence. c. Because the verdict is contrary to, and against, the instructions of the Court.

7. That the Court erred in allowing or permitting A. S. Benner the administrator and father of Clarence J. Benner, deceased, to testify that the said deceased, before his death paid any part of the expenses of maintaining the home of said witness, in which said witness and three of his children were living, over the objection of the defendant, as shown by the record.

8. That the Court erred in allowing or permitting A. S. Benner, the father of Clarence J. Benner, deceased, to testify as to what the total expenses of the household of said witness were during the month next preceding the death of Clarence J. Benner, over the objection of the defendant, as shown by the record.

9. That the Court erred in allowing or permitting the witness A. S. Benner, father of the deceased, to testify that he knew what the deceased was doing with the balance of his earnings, over and above the amount testified by said witness as having been contributed by deceased to the support of said witness' household, over the objection of defendant, as shown by the record.

10. That the Court erred in allowing or permitting the witness, A. S. Benner, father of said deceased, to testify that he did not receive all of the earnings of deceased, a minor son of said witness, over the objection of defendant, as shown by the record.

11. That the Court erred in allowing or permitting the [196] witness, Mrs. Charles Bogel, sister of the deceased, to testify that said deceased had contributed to her support, over the objection of the defendant, as shown by the record.

12. That the Court erred in allowing or permitting the witness, Mrs. Charles Bogel, sister of the deceased, to testify as to what clothing or other supplies the deceased had purchased for the witness before the death of said deceased, over the objection of the defendant, as shown by the record.

13. That the Court erred in permitting or allowing the witness, William S. Benner, brother of the deceased, to testify as to the contribution by the witness of any sum in support of his father, or his father's house or expenses before the death of said Clarence J. Benner, over the objection of the defendant, as shown by the record.

14. That the Court erred in permitting or allowing the witness, William S. Benner, brother of said deceased, to testify that the deceased had contributed to the support of said witness, over the objection of the defendant, as shown by the record.

15. That the Court erred in permitting or allowing A. S. Benner, father of the deceased, to testify as to any control or direction exercised by him over the deceased before his death, over the objection of the defendant, as shown by the record.

16. The Court erred in refusing to grant and in overruling and denying defendant's motion, made and interposed at the conclusion of plaintiff's testimony, for the dismissal of plaintiff's case, and for

judgment in favor of plaintiff in the nature of nonsuit, over the objection and exception of the defendant, as shown by the record.

17. That the Court erred in overruling defendant's motion to instruct the jury to find for the defendant made at the close of all the testimony, as shown by the record.

18. That the Court erred in refusing to instruct the jury to return a verdict for defendant, over the objection and exception of the defendant, as shown by the record.

19. That the Court erred in refusing to instruct the jury to return a verdict for nominal damages only, over the objection and exception of the defendant, as shown by the record.

20. That the Court erred in refusing to instruct the jury as specifically requested by defendant in defendant's requested instructions numbered respectively 1, 3, 7, 11, 12 and 13, over the objection and exception of defendant, as shown by the record.
[197]

21. That the Court erred in giving certain instructions to the jury, requested by plaintiff, over the objection and exception of the defendant, as shown by the record.

22. That the Court erred in certain particulars of its general charge to the jury, excepted to by the defendant at the time, as shown by the record.

23. That the Court erred in overruling defendant's demurrer to the amended complaint, as shown by the record.

24. That the Court erred in permitting the plain-

tiff to amend his amended complaint in the respects asked for, as shown by the record, and designated therein as "First Amendment to Complaint proposed to follow paragraph X" and "Second Amendment to Complaint to follow First Amendment to paragraph X," over the objection and exception of the defendant, as shown by the record, for the following reasons: a. Because said amendments were not made upon affidavit showing good cause therefor. b. Because said amendments changed and added material and new matter to the complaint. c. Because each of said amendments changed the alleged cause of action attempted to be stated in the amended complaint, and was a departure from the original amended complaint as to matters of fact. d. Because said amendments, and each of them, stated a new cause of action, and were departures from the original amended complaint, both as to matters of fact and as to matters of law. e. Because the original amended complaint did not state a cause of action, and there was no complaint on file to be amended.

25. That the Court erred in overruling defendant's demurrer to the amendments to and the amended complaint, as shown by the record.

26. That there were other errors of law appearing upon the trial prejudicial to the rights of the defendant.

WHEREFORE, defendant asks and moves that

the verdict be set aside and a new trial granted herein.

W. A. MASSEY,
CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Defendant.

The undersigned, United States District Judge for District of Nevada, certifies that he hereby allows the foregoing motion and petition for a new trial to be filed herein.

E. S. FARRINGTON,
District Judge. [198]

[Endorsed]: No. 1109. In the District Court of the United States for the District of Nevada. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Plaintiff, vs. Truckee River General Electric Company, a Corporation, Defendant. Notice of Motion and Petition for a New Trial and Motion and Petition for a New Trial. Due service of the within by copy, admitted May 23, 1912, without waiving any rights. Mack, Green, Brown & Heer, Attorneys for Plaintiff. Filed this 27th day of May, 1912, T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Defendant.

**[Order Directing Transmission of Plaintiff's
Exhibit No. 2.]**

No. 1109.

A. S. BENNER, as Admr., etc.,

vs.

TRUCKEE RIVER GEN. ELEC. CO.

ORDER TO FORWARD ORIGINAL EXHIBIT.

It appearing to the Court that plaintiff's original Exhibit No. 2, should be inspected by the Court of Appeals, in connection with the record on writ of error, it is therefore ordered that said exhibits be forwarded with the record, and that it be returned to the clerk of this Court in due course.

**[Order Extending Time to File Record, etc., in
Circuit Court of Appeals.]**

*In the District Court of the United States for the
District of Nevada.*

No. 1109.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

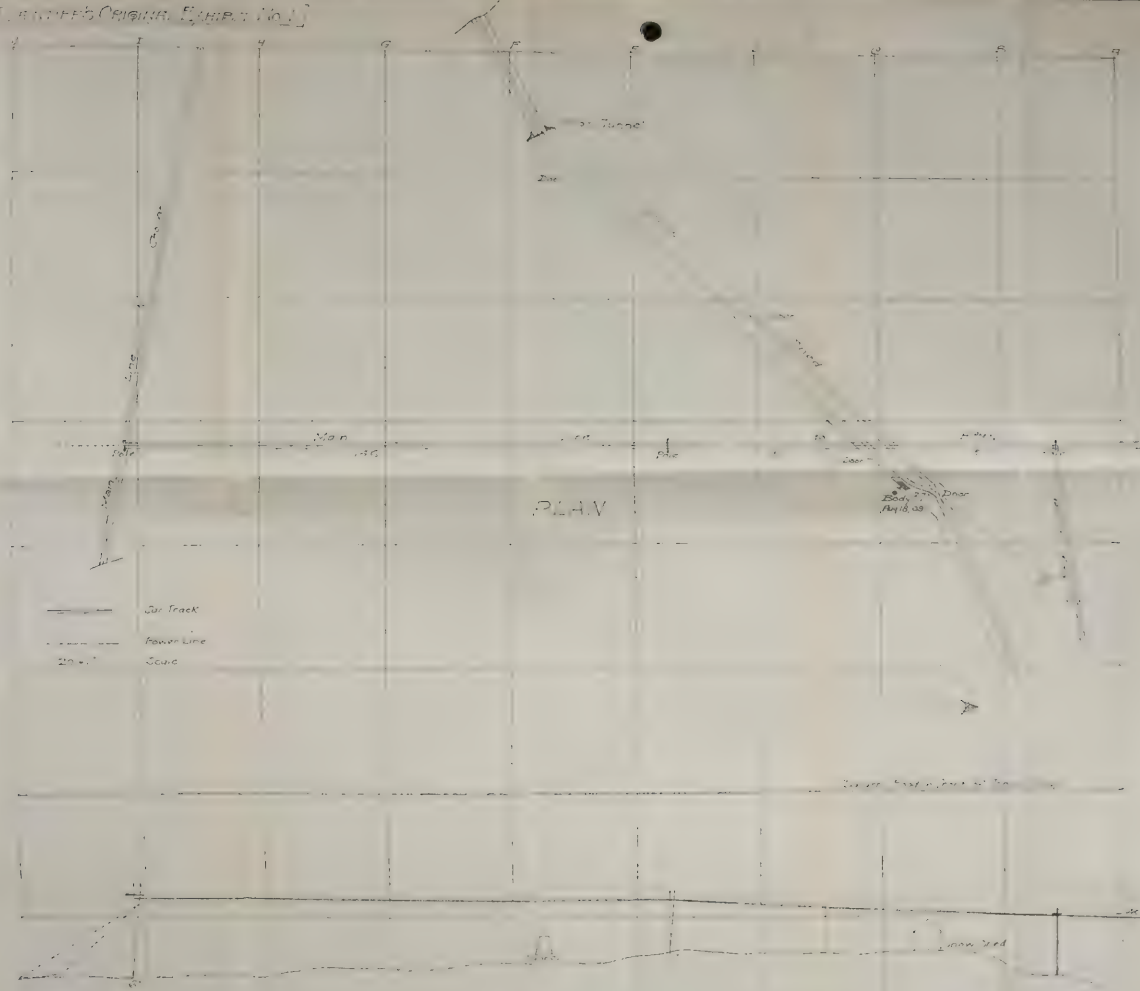
TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

Good cause appearing therefor, it is ordered that the defendant have until and including the 15th day of July, 1913, within which to file in the Court of Appeals the record on Writ of Error heretofore issued in this cause.

Dated June 28, 1913.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 1109. U. S. Dist. Court, Dist. Nevada. Benner, as Admr., v. Truckee Riv. Gen. Elec. Co. Order Extending Time to File Record on Writ of Error. Filed June 28, 1913. T. J. Edwards, Clerk. [199]



Entered No. 1100 at District Court
 Salt Lake City, Utah
 Under the Act of March 3, 1879
 Filed April 15, 1912
 C. Edwards, Agent.

VERTICAL SECTION

Sketches
 H. E. Palmer
 Made at Salt
 Lake, Utah



[Certificate of Clerk U. S. District Court to
Transcript.]

*In the District Court of the United States for the
District of Nevada.*

No. 1109.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,
Plaintiff,

vs.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,
Defendant.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing One Hundred and Ninety-nine (199) typewritten pages, Numbered from 1 to 199, inclusive, also page 199½, being Plaintiff's Exhibit No. 1, and comprised in one volume, to be a full, true and correct copy of the record and of all the proceedings in said cause and court, and that the same, together with the original Citation and Writ of Error, hereto annexed, constitute the return to the Writ of Error.

I do hereby certify that the costs of the foregoing record is \$251.00, and that the same has been paid by the defendant herein.

I further certify that pursuant to order of court, found on page 199 of this record, I have this day forwarded to the Clerk of the U. S. Circuit Court of

Appeals, Plaintiff's Original Exhibit No. 2, introduced and filed in said cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Carson City, Nevada, this 11th day of July, 1913.

[Seal]

T. J. EDWARDS,

Clerk. [200]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

Writ of Error [Original].

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America to
the Honorable Judge of the District Court of the
United States for the District of Nevada,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court for you between Truckee River General Electric Company, a corporation, plaintiff in error, and A. S. Benner, as administrator of the estate of Clarence J. Benner, deceased, defendant in error, a manifest error has happened to the damage of said Truckee River General Electric Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, you send the record and proceedings

aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid, being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, what is right, and according to the laws and customs of [201] the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this, the 4th day of June, A. D. 1913.

[Seal] T. J. EDWARDS,
Clerk of the United States District Court for the
District of Nevada.

Allowed, this, the 4th day of June, A. D. 1913.

E. S. FARRINGTON,
United States District Judge.

Service of the within writ of error and the receipt of a copy thereof is hereby admitted, this, the 5 day of June, A. D. 1913, as above set forth.

MACK & GREEN,
Attorneys for Defendant in Error. [202]

[Endorsed]: No. 1109. In the United States Circuit Court of Appeals for the Ninth Circuit. True-kee River General Electric Company, a Corp., Plaintiff in Error, vs. A. S. Benner, as Admr., etc., Defendant in Error. Writ of Error. Filed June 5th,

1913, T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. [203]

Citation [on Writ of Error—Original].

United States of America,
District of Nevada,—ss.

To A. S. Benner, as Administrator of the Estate of
Clarence J. Benner, Deceased, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the District of Nevada, wherein Truckee River General Electric Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Truckee River General Electric Company, plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable E. S. FARRINGTON,
Judge of the District Court of the United States, for the District of Nevada, this, the 4th day of June, A. D. 1913.

E. S. FARRINGTON,
United States District Judge.

Service of the within citation and the receipt of a copy thereof, is hereby admitted, this 5 day of June, A. D. 1913, as per above.

MACK & GREEN,
Attorneys for Defendant in Error. [204]

[Endorsed]: No. 1109. In the United States Circuit Court of Appeals for the Ninth Circuit. Truckee River General Electric Company, a Corp., Plaintiff in Error, vs. A. S. Benner, as Admr., etc., Defendant in Error. Citation. Filed June 5th, 1913, T. J. Edwards, Clerk U. S. Dist. Court, Dist. of Nevada. [205]

[Endorsed]: No. 2284. United States Circuit Court of Appeals for the Ninth Circuit. Truckee River General Electric Company, a Corporation, Plaintiff in Error, vs. A. S. Benner, as Administrator of the Estate of Clarence J. Benner, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed July 12, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 2284.

TRUCKEE RIVER GENERAL ELECTRIC
COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,

Defendant in Error.

Brief for Plaintiff in Error.

This case was brought by defendant in error, hereinafter, for convenience, referred to as plaintiff, against plaintiff in error, hereinafter, for convenience, referred to as defendant, to recover damages for the death of plaintiff's intestate. The case was commenced in the State Court, and, upon application of defendant, removed into the Federal Court for the District of Nevada. A verdict was returned and judgment entered in favor of plaintiff for \$7,000; defendant's motion for a new trial was denied; hence this writ of error from the final judgment.

STATEMENT OF THE CASE.

Plaintiff filed in the Federal Court an amended complaint (Tr. pp. 4-12), to which a demurrer was interposed (Tr. pp. 13-16), which demurrer was overruled (Tr. pp. 16, 17), and defendant answered (Tr. pp. 17-22), putting in issue all the material allegations in the complaint, and alleging contributory negligence on the part of deceased, and, at Tr.

p. 21, specifically denying that plaintiff, as administrator, etc., or otherwise, has suffered or been damaged in any sum whatsoever by reason of the matters alleged in the amended complaint; and alleging that deceased had been emancipated; and alleging that the brothers and sister of deceased, named as beneficiaries under the Nevada Statute, have not been damaged by any act of defendant in any sum whatsoever.

The case was tried upon the issues thus made. At the conclusion of plaintiff's testimony, plaintiff asked and, over defendant's objection, was granted leave to amend his amended complaint by filing two proposed amendments. To the ruling of the Court defendant took an exception; defendant then filed its demurrer to the complaint as thus amended, which demurrer was overruled, and defendant excepted; defendant then filed its answer to the amended complaint as thus amended, and put in issue each and every of the allegations in the amendments to the amended complaint, and stated that it had no testimony to offer (Tr. pp. 23-28). A verdict was returned and judgment entered in favor of plaintiff, which said judgment was, upon motion of defendant, set aside, and a new trial granted. The new trial resulted, as above stated, in a verdict, and judgment for plaintiff for \$7,000, from which said final judgment this writ of error.

Upon the second trial, defendant offered no testimony, and all the testimony offered on behalf of plaintiff is incorporated in the Transcript of Record, and is before the Court for consideration.

The deceased, at the time of his death, August 18th, 1909, was in the employ of Charles Butters Company, Limited, at Virginia City, Nevada, as a miner. Leading from one of the tunnels of the mine, in which deceased was working, to a rock-breaker several hundred feet away, was a corrugated iron passageway. At the time of the accident, electric wires crossed this passageway nearly at right angles, the wires being supported by poles on each side of said passageway. When these poles were in a vertical position, the electric wires, above mentioned, were suspended from one to three feet above the ridge of said passageway. Some time in July, 1909, the electrician, E. C. Gerry, and the General Manager, Sidney M. Stone, of said Charles Butters Company, Ltd., the employer of deceased, discovered that the guy-wire attached to one of the poles to the south of said passageway had become loosened or broken, and that the two poles immediately to the south were gradually inclined to the north, and that said electric wires passing over said passageway were in danger of touching the crest of said passageway. This information was conveyed by said Gerry and Stone to one W. W. Wright, an employee of defendant, on two or three occasions, in Virginia City (see testimony of Sidney M. Stone, Tr. pp. 142-151, 154-160, and testimony of E. C. Gerry, Tr. pp. 242, 243, 252, 253) and that said Wright agreed to fix said line; that there was nothing in the condition of the line to cause the manager or electrician of the Company employing deceased, or said Wright, to believe there was any immediate danger from said line. That in

said passageway there was an iron track upon which ore cars were run into and out of said mine; that upon the morning of August 18, 1909, deceased came out of the mine into said passageway, sat down in said passageway, leaned against its corrugated iron wall, placing his feet against said iron track, and at once received a shock of electricity which caused his death, the wire crossing the top of said iron passageway having come in contact with the crest of the roof.

The deceased, Clarence J. Benner, was a son of plaintiff, A. S. Benner, and at the time of his death, August 18, 1909, was of the age of about eighteen years, ten months, and had never been married. The mother of deceased had been dead several years at the time of his death; deceased left him surviving his father, A. S. Benner, aged sixty-two years, who sues as administrator of the Estate of Clarence J. Benner, Deceased, and three brothers and one sister (said brothers and sister are the sole beneficiaries under the Statute under which the case was brought), to wit, C. E. (Ed) Benner, a brother aged thirty-two years; G. G. (George) Benner, a brother aged twenty-two years; William H. Benner, a brother aged twenty years, and Mrs. Charles Bogle, a sister, aged twenty-five years (Tr. pp. 11, 12, 162, 163).

At the time of deceased's death there were residing at the home of, and with, the father, A. S. Benner, the three sons, to wit, George, Will and Clarence, neither of whom had been married. Ed. Benner, the oldest brother, and Mrs. Bogle, the sister, were married and maintaining their own, separate homes (Tr. pp. 163, 172, 175, 180).

The expense of the father's home and family, consisting of himself and three of his sons, George, Will and Clarence, the deceased, were borne by the three sons, and amounted to between \$80 and \$90 per month; George and Clarence, who had steady employment, paying the larger portion thereof, and Will, the other brother, who was an apprentice fireman on the Virginia & Truckee Railway, contributing when he was earning money; the father taking care of the house and preparing the meals (testimony of the father, A. S. Benner, Tr. pp. 166, 167, 173, 174, 175, 178, 180; testimony of William H. Benner, Tr. pp. 181, 182, 183).

Ed Benner, a brother, before he was married contributed to the father's household expenses the same as Clarence did, but after he was married in 1904, and had his own household, he ceased to contribute anything to the father's household (Tr. p. 179); he had been constantly mining and living apart and separate from his father, keeping his own household since his marriage (Tr. p. 172).

George Benner was married in 1910, and ever since he had lived separate and apart from his father, maintaining his own household, and had not contributed anything toward the support of his father's household expenses (Tr. p. 180).

William H. Benner was married in 1911, and ever since he had lived separate and apart from his father, maintaining his own household, and had not contributed anything toward the support of his father's household (Tr. pp. 175, 176, 179); Mrs. Bogle was married in 1904, living with her husband and maintaining her own home (Tr. pp. 189, 190).

That deceased had been employed by said Charles Butters Company, Ltd., about fourteen or sixteen months prior to the time of his death, and had contributed toward the expenses of his father's household, consisting of himself, his father, and brothers, George and William, between \$40 and \$50 per month (Tr. p. 166); that out of the wages of deceased there was given to the brother William H. Benner, a minor, according to his testimony, when he was out of work and needed money, about \$10 or \$15 per month, and about \$40 or \$50 per year for clothing (Tr. pp. 181-184); and that out of the wages of deceased there was contributed or given to his sister, Mrs. Bogle, according to her testimony (Tr. p. 187), about \$15 in money each month, and between \$18 and \$28 each month for clothing.

It appears from Mrs. Bogle's testimony (Tr. p. 188), that deceased had been working for Charles Butters Company, Ltd., fourteen months; that prior to the time he began work for said company deceased had worked one year in a butcher-shop in Virginia City, cutting meat and driving the delivery wagon; that prior to that time he peddled papers (Tr. p. 188).

There was no showing that deceased had accumulated any money, nor as to what portion of his earnings was required or expended for his maintenance, except the \$40 to \$50 per month used for his board and lodging in his father's home.

That deceased was a healthy, robust man, was working as a miner, receiving \$4 a day, and had been

so working about fourteen to sixteen months prior to the time of his death, August 18, 1909.

There was read into the record from the American Experience Table of Mortality so much thereof as has a bearing upon the expectancy of life of Clarence J. Benner, deceased, and the one brother, William H. Benner, and the sister Mrs. Charges Bogle, which table showed that the expectancy of life of Clarence J. Benner deceased, was between forty-two and forty-three years, and that the expectancy of life of said William H. Benner was between forty-one and forty-two years, and that the expectancy of life of Mrs. Bogle was between thirty-nine and forty years (Tr. pp. 192-194).

At the conclusion of plaintiff's testimony, defendant announced that it would offer no testimony. And at the same time moved for a dismissal and nonsuit, for the reasons then stated and as appear in Tr. pp. 202-205.

The motion of defendant was denied; and the defendant at the time excepted, for reasons then specified, as appear in Tr. pp. 205, 206.

Upon the close of the evidence, plaintiff requested the Court to give to the jury certain instructions, which appear in the Transcript, at pp. 207-210.

At the close of the evidence, defendant requested the Court to give to the jury certain instructions, which appear in the Transcript, at pp. 210-214.

At the conclusion of the argument, the Court instructed the jury, which said instructions appear in the Tr., pp. 214-225.

At the conclusion of the giving of the instructions

by the Court to the jury, defendant took certain exceptions to the instructions given, and to the refusal of the Court to give certain of the instructions requested by defendant, which said exceptions appear in the Transcript, at pp. 226-236.

The jury returned a verdict for the plaintiff and assessed the damages in the sum of \$7,000 (Tr. pp. 31, 236).

Defendant filed its notice of motion and petition for a new trial, and motion and petition for a new trial (Tr. pp. 321-327), which said motion for a new trial was denied (Tr. p. 279), the opinion denying said motion for a new trial appearing in the Transcript at pp. 280-292.

Judgment was entered upon said verdict, and defendant filed its petition for writ of error, and therewith filed its assignments of error and bond on writ of error, which said bond was approved, and the writ of error granted (Tr. pp. 292-320).

THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

1. The right of plaintiff, even by leave of Court, to change the theory of his case by filing the two proposed amendments to the amended complaint, over the objection and exception of defendant (Tr. pp. 23-26; Assignment of Error II, Tr. pp. 295, 296).

2. The overruling of defendant's demurrer to plaintiff's amended complaint as amended, by the two separate amendments, to which ruling of the Court defendant excepted (Tr. pp. 23, 27-28; Assignment of Error III, Tr. p. 293).

3. The admission of testimony of A. S. Benner, father of deceased, over the objection of defendant, to the effect that deceased, prior to his death, paid any part of the expenses of maintaining the home of the father; and to the effect that the father did not receive all the earnings of deceased, his minor son (Tr. pp. 164-168; Assignment of Error XVIII, Tr. p. 312).

4. The admission of testimony of Mrs. Bogle, sister of deceased, over the objection of defendant, to the effect that deceased had contributed to her support (Tr. p. 186; Assignment of Error XIX, Tr. p. 312).

5. The admission of testimony of William H. Benner, brother of deceased, over the objection of defendant, to the effect that deceased had contributed to his support (Tr. p. 181; Assignment of Error XX, Tr. p. 313).

6. The overruling of defendant's motion, interposed at the close of plaintiff's testimony, to dismiss the action for the reasons assigned in support of said motion, and exceptions to the ruling of the Court in denying said motion. (Tr. pp. 202-206; Assignment of Error IV, Tr. pp. 297-300).

7. The refusal of the Court to give certain of defendant's requested instructions, to wit, No. 1, No. 3, No. 7, and No. 11 (Tr. pp. 210-213), to which exceptions were taken at the time (Tr. pp. 227-229; Assignment of Error V, Tr. pp. 300-302; Assignment of Error VI, Tr. p. 302; Assignment of Error VII, Tr. p. 303; Assignment of Error VIII, Tr. p. 305).

8. The giving by the Court of certain of plain-

tiff's requested instructions, to wit, No. 8, No. 9 and No. 10, Tr. pp. 208-210, which were given by the Court at Tr. pp. 219-222, to which exceptions were taken at the time (Tr. p. 233; Assignment of Error XV, Tr. p. 310; Assignment of Error XVI, Tr. p. 311; Assignment of Error XVII, Tr. p. 311).

9. The damages awarded by the jury are excessive (Assignment of Error XXI, Tr. p. 314).

10. The verdict of the jury is contrary to the law (Assignment of Error XXII, Tr. pp. 314-316).

11. The verdict of the jury is not sustained by the evidence (Assignment of Error XXIII, Tr. p. 316).

12. Whether or not deceased, being a minor son, and living with and constituting a member of, his father's household, had been emancipated, prior to the time of his death, as was alleged in the first proposed amendment to the amended complaint (Tr. p. 24), and denied in the answer thereto (Tr. p. 29, 30).

13. Whether or not defendant was guilty of any actionable negligence, or whether or not the negligence of defendant, if any, was the approximate cause of the death of Clarence J. Benner, as alleged in the complaint, and denied in the answer.

14. Whether or not the beneficiaries named in the statute, to wit, the brothers and sister of deceased, suffered any pecuniary injury by reason, or on account, of the death of their brother, who was a minor, living with his father.

15. The order of Court denying defendant's motion for a new trial.

SPECIFICATION OF ERRORS RELIED UPON AND INTENDED TO BE URGED.

Defendant specifies the following, as errors relied

upon and intended to be urged for the reversal of the judgment herein, to wit:

1. Assignment of Error II, Tr. pp. 295, 296, and having reference to the ruling of the Court in permitting plaintiff to amend his amended complaint, as set out in the two separate amendments. (Tr. pp. 24, 25.)

2. Assignment of Error III, Tr. p. 296, and having reference to the overruling of defendant's demurrer to the complaint as amended by two separate amendments. (Tr. pp. 27, 28.)

3. Assignment of Error IV, Tr. pp. 297-300, and having reference to the ruling of the Court in denying defendant's motion, made at the close of plaintiff's evidence, to dismiss the action, as appears at Tr. pp. 202-206.

4. Assignment of Error V, Tr. pp. 300-302, and having reference to the refusal of the Court to give defendant's requested instruction No. I, which reads as follows: "I instruct you to return a verdict for the defendant" (Tr. p. 210); exceptions to the refusal of the Court to give said requested instruction appearing. (Tr. pp. 227, 228.)

5. Assignment of Error VI, Tr. pp. 302, 303, and having reference to the refusal of the Court to give defendant's requested instruction No. III, which reads as follows: "There is no evidence in this action tending to prove whether said Clarence J. Benner, deceased, in his lifetime was in the habit of saving his money, or whether he ever accumulated any estate or property, or whether he ever contributed to the support of his brothers or sister, or either of

them, or whether his said brothers or sister, or either of them, ever had any reasonable expectation of receiving aid from him. Therefore, if you find a verdict in favor of the plaintiff, you must limit the amount of damages to a merely nominal sum" (Tr. p. 310); exceptions to the refusal of the Court to give said requested instruction appearing Tr. p. 228.

6. Assignment of Error VII, Tr. pp. 303, 304, having reference to the refusal of the Court to give defendant's requested instruction No. VII, which reads as follows: "It is alleged in the complaint and has not been denied, that deceased was at the time that he met his death engaged as a miner in the employ of the Charles Butters Company, Limited. I therefore instruct you that it was the duty of the Charles Butters Company, Limited, to provide for said Clarence J. Benner while engaged in its employment a safe place in which to work; and if you find that said Charles Butters Company, Limited, failed to furnish the said Clarence J. Benner a safe place to work, and that by such failure or neglect Clarence J. Benner was killed, then I instruct you that his death was caused by the negligent act of said Charles Butters Company, Limited, and you may take that matter into consideration in arriving at your verdict in this action" (Tr. p. 212); exceptions to the refusal of the Court to give said requested instruction appearing Tr. pp. 228-229.

7. Assignment of Error VIII, Tr. pp. 305, 306, and having reference to the refusal of the Court to give defendant's requested instruction No. XI, which reads as follows: "I further instruct you that when

a child is under age, the parents have a right to his earnings, and may therefore sue for the loss experienced by his death, but this right ends when he attains his majority, and, if death occurs before that, a recovery is limited in consequence to his probable earnings up to that time; the chance of survivorship, his ability and willingness to support others, being too vague, as is declared, to enter into an estimate of damages merely compensatory" (Tr. p. 213); exceptions to the refusal of the Court to give said requested instruction appearing Tr. p. 229.

8. Assignment of Error X, Tr. p. 308, and having reference to the refusal of the Court to give defendant's requested instruction No. XIII, which reads as follows: "I further instruct you that if you find for the plaintiff in this case, then the amount to be fixed by you shall consist only of such pecuniary damages which would be the exact equivalent of the injury, if any, sustained by Mrs. Charles Bogle, sister of deceased, as is shown by all the evidence in this case by reason of the death of said Clarence J. Benner" (Tr. p. 214); exceptions to the refusal of the Court to give said requested instruction appearing Tr. pp. 230, 231.

9. Assignment of Error XI, Tr. p. 309, and having reference to the giving by the Court of plaintiff's requested instruction No. IV, which reads as follows: "It is the duty of an electric company owning, maintaining and using electric wires charged with a deadly or dangerous current of electricity to furnish, as nearly as possible, perfect protection to those who may have occasion to use or be near the same" (Tr.

p. 208); exceptions to the giving by the Court of said requested instruction appearing Tr. p. 232.

10. Assignment of Error XII, Tr. p. 309, and having reference to the giving by the Court of plaintiff's requested instruction No. V, which reads as follows: "The care, protection and diligence required of the owners or users of electric currents and wires charged with electricity varies with the danger which might be incurred by negligence. The greater the degree of danger, the greater the degree of care required" (Tr. p. 208); exceptions to the giving by the Court of said requested instruction appearing Tr. p. 232.

11. Assignment of Error XIII, Tr. p. 309, and having reference to the giving by the Court of plaintiff's requested instruction No. VI, which reads as follows: "In all cases where electric wires carry or may carry strong and dangerous currents of electricity, and the result of negligence might expose to death or serious injury any person who may be lawfully in proximity of the wires or liable to come in contact with them, a high degree of care and diligence to avoid said results is required" (Tr. p. 208); exceptions to the giving by the Court of said requested instruction appearing Tr. p. 232.

12. Assignment of Error XIV, Tr. p. 310, and having reference to the giving by the Court of plaintiff's requested instruction No. VII, which reads as follows: "Corporations can only act through their officers, agents and employees, within the scope and sphere of their employment. The acts of such employees, agents and officers within the scope and sphere of their employment, are, in a legal sense, the

acts of a corporation, such acts as the corporation itself would do, or is empowered to do, and for which the corporation is liable" (Tr. p. 208); exceptions to the giving by the Court of said requested instruction appearing Tr. p. 232.

14. Assignment of Error XVI, Tr. p. 311, and having reference to the giving by the Court of plaintiff's requested instruction No. IX, which reads as follows: "The Court instructs the jury that if they believe from the evidence, that on the 18th day of August, 1909, Clarence J. Benner, came to his death while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended complaint filed herein; and if the jury further believe from the evidence that the death of said Clarence J. Benner was caused by the negligence of the defendant, Truckee River General Electric Company, as charged in the declaration; and if the jury further believe from the evidence that the said Clarence J. Benner left him surviving brothers and a sister, as charged in the complaint; and that such brothers and sister, by the death of said Clarence J. Benner, have suffered pecuniary loss, in law, the plaintiff is entitled to recover" (Tr. p. 209); exceptions to the giving by the Court of said requested instruction appearing Tr. p. 232.

15. Assignment of Error XVII, Tr. p. 311, and having reference to the giving by the Court of plaintiff's requested instruction No. X, which reads as follows: "If the jury should find for the plaintiff, the pecuniary value of the life of the deceased to his brothers and sister is to be determined by you

from all the evidence in the case, and in this connection you may consider the deceased's age, condition of health and strength at the time of his death, his capacity for earning money, his occupation, his personal habits, his wages, and all other facts in evidence; and the value is to be fixed at the present worth of the amount which it is reasonable the deceased would have contributed to his said brothers and sister in money, property or services, had he lived, during his and their expectancy of life, and of which, in view of all the evidence, they were, in your judgment, deprived by the death of Clarence J. Benner'' (Tr. p. 209); exceptions to the giving by the Court of said requested instruction appearing Tr. p. 232.

16. Assignment of Error XVII, Tr. p. 312, and having reference to the admission of testimony of A. S. Benner, plaintiff and father of deceased; said testimony being in reference to deceased paying part of the expenses of the home of said father, and in reference to the father not receiving all the earnings of deceased, and in reference to the emancipation of the deceased.

The substance of the evidence so admitted, over the objection of the defendant, is as follows:

At the time of Clarence Benner's death, August 18th, 1909, the witness, A. S. Benner, being the father, lived in Virginia City, and in his home there were living with him his three sons, George, between twenty-one and twenty-two years of age; Will, between twenty and twenty-one years of age; and Clarence, the deceased, between eighteen and nineteen

years of age; the expenses of maintaining the home amounted to between \$80 and \$90 per month, which sums were paid by the three boys mentioned; George and Clarence had steady employment, and furnished the greater portion of the expenses, Clarence furnishing between \$40 and \$50 of the \$80 or \$90 expenses; George and Will furnishing the balance, Will contributing whenever he had employment; the father taking care of the house, getting breakfast, etc. The father did not receive the wages received by Clarence, over and above the sum of \$40 or \$50 per month; that he knew what he was doing with the balance of his wages (Tr. pp. 161–180). As to the question of emancipation, on direct examination (Tr. pp. 168–171), the following questions were asked and answers given: “Q. Outside of the working hours of Clarence, during the last year of his life, Mr. Benner, do you know whether or not anybody exercised any control or directions over the goings or comings of Clarence Benner? A. I do not. Q. Mr. Benner, during the last year of Clarence’s life, what, if anything, did you do towards directing the movements or comings or goings of Clarence Benner, deceased? A. He was working every day, and I would get up and get the breakfast and he would go to work, and come home, and if he was going out he would tell me where he was going, and what time he would be coming in.”

Upon cross-examination, the witness (Tr. pp. 177–179), in substance testified as follows: The deceased furnished money for the household from the time he started to work; he would bring the money and

give it to the father; that same condition continued up to the time of his death; it was not necessary to make any demands of the deceased; prior to the last year of deceased's life, the father would get up and get breakfast; deceased would go to work, and if he was going out afterwards, he would generally tell the father when he was coming back, and whether he would be late or not, and that no change in those conditions existed, except deceased received better wages during the last year than prior to that time; that this same condition or custom or relation between the father and the other sons existed; that the same relation between the father and the older son, Ed. Benner, existed prior to the time of the marriage of said Ed. Benner, and that the said relations existing between the father and each of the sons ceased upon the marriage of the son.

17. Assignment of Error XXIX, Tr. p. 312, and having reference to the admission of testimony of Mrs. Charles Bogle, sister of deceased, who was a married woman, living with her husband, separate and apart from her father and her deceased brother; said testimony being in reference to the contributions to her support made by deceased.

The substance of the evidence so admitted, over the objection of defendant, is as follows:

That during the year preceding the deceased's death, in addition to contributions for her support made by her husband, deceased contributed \$15 in money each month, and between \$18 and \$28 each month in clothing; that these contributions contin-

ued for about five years before the death of deceased; that the contributions the last year were more than the preceding years (Tr. pp. 186, 187, direct examination).

18. Assignment of Error XX, Tr. p. 313, having reference to the admission of testimony of William H. Benner, a brother of deceased; said testimony being in reference to the contributions by deceased to said brother, who was a minor and an apprentice fireman of the Virginia & Truckee Railway Company.

The substance of the evidence so admitted, over the objection of defendant, is as follows:

That during the last year preceding the deceased's death, his living and personal expenses were paid by his brother Clarence; that witness took his meals during that time at the home of his father; that deceased bought for the witness his shoes and underclothing, but not outside clothes, and gave him money besides, the money contributed amounting to about \$10 or \$15 a month; this condition continued during the year before deceased's death, the amount of clothing contributed amounted to about \$40 or \$50 during the year (direct examination, Tr. pp. 181, 182). Upon cross-examination it appeared that the money contributed was only when witness was not working and needed it; that he was trying to get a steady run on the Virginia & Truckee Railroad, and when he did not have steady work, his brother helped him (Tr. p. 184).

19. Assignment of Error XXI, Tr. p. 314, being to the effect that damages awarded by the jury are excessive.

20. Assignment of Error XXII, Tr. p. 314, being to the effect that the verdict of the jury is contrary to the law.

21. Assignment of Error XXIII, Tr. p. 316, being to the effect that the verdict of the jury is not sustained by the evidence.

22. Error of the Court in overruling defendant's motion for a new trial.

ARGUMENT.

The State Statute, under which this case was brought and determined, reads as follows:

“Section 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the persons who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; and although the death shall have been caused under such circumstances as amount in law to a felony.

“Sec. 2. The proceeds of any judgment obtained in any action brought under the provisions of this Act shall not be liable for any debt of the deceased; provided, he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of a deceased child; but shall be distributed as follows: First—If there be a surviving husband or wife, and no child, then to

such husband or wife; if there be a surviving husband or wife, and a child or children, or grandchildren, then, equally to each, the grandchild or children taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or children, then to such child or children and grandchild or children by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons; provided, every such action shall be brought by and in the name of the personal representative or representatives of such deceased person; and, provided further, the jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named."

'Cutting's Comp. Ann. Laws, sections 3983, 3984.

A construction of this Statute is essential to the proper determination of this case.

This Statute was construed by the trial Court, and his construction seems to be, because the Statute says, "the jury in every such action may give such damages, pecuniary and exemplary as they shall deem fair and just," that the Court is bound by the verdict, regardless of the amount thereof; and this, notwithstanding that the conditions existing at the time of the death are such that it is not within the

range of probability that they would continue, or that the verdict may be contrary to the instructions given, or not supported by the evidence.

We quote from the opinion denying defendant's motion for a new trial, as follows:

"If it were the intention of the legislature that recovery should be restricted to the pecuniary injury suffered by the kindred named, it seems very strange that it was not so stated, instead of saying 'the jury in every such action may give such damages, pecuniary and exemplary as they shall deem fair and just.' " (Tr. p. 284.) * * *

"It is not within the range of probability that the conditions which existed during the year preceding the death of Clarence Benner would continue indefinitely. Clarence was the youngest of the family. It is not to be assumed that during the whole expectancy of life, about 40 years, he would remain unmarried, and contribute so large a proportion of his earnings to his older brothers, and sister, who at the time of the trial were apparently in good health." (Tr. p. 287.) * * *

"\$7,000 is more than I should have awarded under the instructions, but it is less, in my judgment, than the pecuniary value of the life of Clarence Benner. However, it is the judgment of the jury, and not of the Court, as to what is just and fair, which the Statute requires." (Tr. p. 289.)

We submit that there is an irreconcilable conflict between the instructions given; and the opinion denying the motion for a new trial, both of which were rendered by the same judge; we submit fur-

ther that the construction of the Statute, above set forth, by the learned trial judge is erroneous, and that such erroneous construction has resulted in injury to the defendant.

In *Roach, Admr., vs. Imperial Mining Company*, 7 Fed. 698, the above-mentioned Statute was construed by Hillyer, District Judge, as creating two causes of action—two grounds upon which a recovery can be had. We quote from the opinion as follows:

“Under this statute there are two causes of action—two grounds upon which a recovery can be had: one for the injury to the deceased, and one for the injury to the kindred named in the act. In the first case the jury may give such damages, pecuniary and exemplary, as they shall deem fair and just; and in the second may take into consideration the pecuniary injury to the kindred named in the act. The use of the words ‘pecuniary and exemplary,’ in the first clause of the proviso, and of the word ‘pecuniary,’ in the last, is significant, and shows that the legislature had both causes of action in view. Otherwise the last clause would serve no purpose.”

The same Statute was construed by Hawley, District Judge, in

Peers vs. Nevada Power Light & Water Company, 119 Fed. 400,

wherein the learned Judge held that the Statute gives but one cause of action, and that this is given in section 1; that section 2 does not provide for another cause of action, but merely provides how the proceeds of any judgment should be distributed, and

provides *what proof may be given, and measures the recovery*. We quote from the opinion, pp. 402, 403, as follows:

“I differ with Judge Hillyer in his construction of the act that ‘there are two causes of action—two grounds upon which a recovery can be had,—one for the injury to the deceased, and one for the injury to the kindred named in the act.’ A careful reading of the entire act shows that there is but one cause of action, and this is given in section 1 (3983). The second section (3984) does not provide for another cause of action. It simply provides ‘how the proceeds of any judgment’ obtained under section 1 shall be distributed, and, after declaring that ‘such action (that is, the action based upon the provisions of the first section) shall be brought by and in the name of the personal representative or representatives of such deceased person,’ it then further provides that ‘the jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named.’ This latter clause does not give another cause of action, *but provides what proof may be given in the cause of action based upon the provisions of section 1*. The first section creates the right of action, and the second section *measures the recovery*, and declares how the distribution must be made under the right created.” * * *

“The intention of the legislature must, of course,

be given controlling effect; but in applying the ordinary and well-established canons of construction to be given to statutes it does not seem reasonable that the legislature intended to give two independent causes of action for the same injury, *which causes of action would have to be separately stated in the complaint.*”

Whether it be determined that the Statute gives two or one cause of action, it is perfectly clear from the amended complaint in this case that only one cause of action, if the complaint states a cause of action, is stated. The theory of the plaintiff is clearly shown—by the two proposed amendments to the amended complaint (Tr. pp. 24, 25), and by the instructions No. 9 and No. 10, requested by plaintiff and given by the Court (Tr. pp. 209, 221, 222),—to be that he is entitled to recover *only such pecuniary loss suffered by the brothers and sister* by reason of the death of deceased, and that the value of such damage or loss is to be fixed at the present worth of the amount which it is reasonably probable the deceased would have contributed to his brothers and sister had he lived during his and their expectancy of life.

That this is the theory upon which the case was brought, and upon which the trial Court proceeded in giving the instructions to the jury, is further shown by defendant’s requested instruction No. 10 (Tr. p. 213), which was given by the Court (Tr. p. 220), which instruction reads as follows: “If you find for the plaintiff in this case, the amount to be fixed by you *should consist only of such pecuniary*

damages as would be the exact equivalent of the injury, if any, sustained by the brothers and sister of the deceased, as shown by all the evidence in this case, by reason of the death of Clarence Benner."

Under the Statute above quoted the father is not named as a beneficiary; upon the trial of the case it was agreed and admitted that the father was not a beneficiary, and that no claim was made that he was a beneficiary (Tr. pp. 165, 166); the Court in its instructions to the jury (Tr. p. 221), in reference to this matter said: "A. S. Benner, father of Clarence Benner, deceased, is not entitled, and will not be entitled, to participate in the proceeds of any judgment which may be rendered in favor of the plaintiff herein, and is not to any extent, under the facts of this case as set out in the complaint, a beneficiary of any judgment obtained herein, by reason of the death of Clarence Benner. I therefore instruct you that in determining the amount of damages, if any, to which the plaintiff is entitled in this case, you will not consider any loss or damage which the said A. S. Benner, father of said deceased, has sustained by reason of the death of said Clarence J. Benner, if you do find that his death was caused by the negligence of the defendant in this action."

The Court further instructed the jury (Tr. p. 220), as follows: "Pecuniary damages are the precise measure of the injury done. * * * You cannot award to plaintiff in this action exemplary damages by way of punishment or as smart money for defendant's negligence, if any, in causing the death of Clarence Benner."

Therefore, it is perfectly clear, upon the theory of plaintiff's case, as made and tried by him, and under the instructions given, the jury were not permitted to return a verdict, if they found for plaintiff, *for any sum except the amount should consist only of such pecuniary damages as would be the exact equivalent of the injury sustained by the brothers and sister of the deceased*, as shown by all the evidence in the case, by reason of the death of Clarence Benner.

The Statute above quoted was construed in

Christensen, as Admr., etc., vs. Floriston Pulp & Paper Company, 29 Nev. 552.

This was an action to recover for a death. The opinion is instructive as to the construction of the Statute by the Supreme Court of Nevada, both as to the measure of damage and as to the function of the jury.

As to the measure of damage, we quote from the opinion, the contention of plaintiff and the answer of the Supreme Court thereto, as follows: The contention of plaintiff,—

“The amount awarded, \$10,000, is comparatively a small damage to pay for a human life lost through gross negligence of an employer, is but one-third of the amount demanded, and was fixed by the legally constituted authority, the jury.”

The answer by the Court,—

“Whether or not \$10,000 is a large or a small damage to pay for a human life depends entirely upon the facts of a given case. In one sense no amount of money might compensate for a human

life, *but the law only looks at the question from the point of actual monetary damage sustained by the person for whose benefit the action is brought, and not that inflicted upon the decedent.* (Redfield vs. Oakland R. Co., 110 Cal. 277, 42 Pac. 822.)

Where more than nominal damages is claimed, such damages must be determined very largely upon questions of relationship and dependency existing between the decedent and the beneficiary at the time of the death" (p. 570).

As to the function of the jury, we quote from the opinion as follows:

"The jury must be governed by the evidence under proper instructions, and, if it renders a verdict for an amount manifestly in excess of anything which the facts of the case would warrant, it is the duty of the Court to modify or set it aside" (p. 571).

As to the measure of damage, in the opinion of the Supreme Court of Nevada, *supra*, many authorities are referred to, and quotations taken therefrom, to the effect that in cases of this kind, it is definitely settled that the damages to be recovered for the injury causing death are always limited to the pecuniary loss suffered by the beneficiaries of the person killed by reason of his death; that this pecuniary loss may be either a loss arising from the deprivation of something to which such heirs *would have been entitled* if the person had lived, or a loss arising from the deprivation of benefits which, from all the circumstances of the particular case, *it could be reasonably expected* such heirs would have received

from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only.

From another citation the Court quotes,—

“The relatives, or the representatives in their behalf, can recover the value of that which they have lost through the wrongful act of the defendant, and nothing more. It is true, in the case of a mother or wife, the jury have been allowed to consider the fact that they were deprived of the comfort, society, and protection of a son or husband, but *it has been always held* that this was in strict accordance with the rule that *only the pecuniary value* of the life *to the relatives* could be recovered. The probable comfort, society, and protection of the deceased had some pecuniary value” (p. 572).

In the case at bar these elements are lacking, the beneficiaries, being brothers and sister, were not entitled to the society or protection of the deceased, and by his death they have not been deprived of that to which they were not entitled under the law.

As to the function of the jury, we quote a paragraph quoted in the opinion, as follows:

“However, the discretion of the jury in awarding damages is under the control of the Court, and damages is under the control of the Court, the damages out of all proportion to the actual earnings of the deceased or *to any reasonable expectation of pecuniary benefit* from him will not be allowed; and, where the circumstances of the case or the evidence produced indicate that the verdict

was the result of bias, prejudice, or gross overestimate, the Courts have not hesitated to set such verdict aside. The Courts have shown less hesitation in setting aside the verdict where the action is brought for the benefit of next of kin *not dependent upon the deceased* than where the action is for the benefit of the widow or the children, and, where the amount awarded is clearly in *excess of the expectation of pecuniary benefit* to be derived from deceased *by said next of kin*, the judgment will be reversed" (p. 573). * * *

"Even though the Statute allows a jury great latitude in fixing the award of damages in cases of this kind, which Courts will not disturb except in extreme cases, nevertheless the judgment must be for an amount which under the evidence adduced is just."

In the case from which we have quoted, the beneficiaries were father and mother. The Supreme Court reduced the verdict from \$10,000 to \$3,000.

In the case at bar there is no evidence whatever of the condition, either present or prospective, of the beneficiaries; no proof of any agreement or intimation by or on behalf of deceased that he would continue to contribute to his brother or sister.

The beneficiaries in this case are collateral relatives; the deceased was under no obligation, legal or moral, to support or to contribute in any way or manner to the support of his brothers or sister, and so far as the record shows, may never have contributed anything further to their support.

The amounts contributed by deceased for his liv-

ing expenses cannot, in any sense, be considered as contributions or be considered in measuring the present worth of the amount which it is reasonably probable that deceased would have contributed to his brothers and sister had he lived.

There is no claim of any contribution to either of the older brothers. And as to the contribution to William H. Benner, the proof is that he was not married and that said contributions were made because he was a minor, an apprenticed fireman, not working regularly, and that the amounts were contributed under these circumstances; but the proof shows that this brother married in 1911, and was mining—maintaining his own home, and there was no proof that he was longer in need of the money and clothing formerly contributed to him because of his need.

The contributions to the married sister, Mrs. Bogle, according to her testimony, were \$15 in money, and \$18 to \$28, say \$23, in clothing per month, making a total of \$38 per month, or \$456 per year, or \$18,240 for the forty years, her expectancy of life. Will any sane man say that it is reasonably probable that contributions in such an amount would have been made under the facts disclosed in this record?

Yet, that is the effect of the verdict and judgment; not only that, but more, the judgment, \$7,000, put out at legal rate of interest, seven per cent, would return annually \$490 or \$34 more than the total contribution; this interest in forty years would amount to \$19,600, or \$1,360 more than the total contributions. But this is not all; at the expiration of the

expectancy the \$7,000, principal, would be intact, to be put out at interest for all time to come.

The verdict and judgment is contrary to the law, and in violation of the instructions given, is not fair or just, and not based upon any evidence but is speculation and guess.

The jury were not allowed and had no authority, under the facts of this case, there being beneficiaries named in the Statute, and especially under the instructions, to return a verdict for any amount as damages to the estate; the only amount to be considered was the present worth of the amount which it is reasonably probable the deceased would have contributed to his brothers and sister.

For convenience, we quote from the instructions on this point, as follows:

“Pecuniary damages are the precise measure of the injury done. * * *

“If you find for the plaintiff in this case the amount to be fixed by you should consist only of such pecuniary damages as would be the exact equivalent of the injury, if any, sustained by the brothers and sister of the deceased, as shown by all the evidence in this case, by reason of the death of Clarence Benner.” (Tr. p. 220) * * *

“If you should find for the plaintiff, the pecuniary value of life of the deceased to his brothers and sister is to be determined by you from all the evidence in this case, * * * and the value is to be fixed at the present worth of the amount which it is reasonably probable the deceased would have contributed to his said brothers and sister in money, property or services, had he lived, and of

which, in view of all the evidence, they were, in your judgment, deprived by the death of Clarence Benner.”

Deceased's earnings at \$4 per day, working thirty days each and every month, would amount to \$120 per month. Assuming that the testimony, as to the contributions, is true—does anyone believe, can the Court say that it is reasonable to believe, or expect, that deceased would have continued, for his expectancy of life, approximately forty-two years, or the expectancy of life of the beneficiaries, approximately forty years, to work thirty days in each and every month for each and every year for the forty-two years, and continue to give of his earnings the amounts mentioned in the testimony?

The record shows the Benner family to be a marrying family; the father twice married; all the brothers and sister married; deceased was a healthy, robust young man, between eighteen and nineteen years of age at the time of his death. Is it reasonable to suppose that he would have remained single all his life, or is it reasonable to suppose that, even if he had remained single, that he would have continued to contribute of his wages to the support of his married sister and brothers?

The trial court in the opinion (Tr. p. 287), in this connection said: “It is not within the range of probability that the conditions which existed during the year preceding the death of Clarence Benner would continue indefinitely. Clarence was the youngest of the family. It is not to be assumed that during the whole expectancy of life, about 40 years, he would

remain unmarried, and contribute so large a proportion of his earnings to his older brothers, and sister, who at the time of the trial were apparently in good health.”

That the verdict and judgment are contrary to law, we cite,—

Reiter-Conley Mfg. Co. vs. Hamlin, 40 So. 281-289.

“The true measure of damages in such cases is, as heretofore declared by this Court that which gives such sums as, being put to interest, will each year, by taking a part of the principal and adding it to the interest, yield the amount of the deceased’s yearly contribution to his family, less his personal expenses, and so that the whole remaining principal, at the end of his expectancy of life, added to the interest on this balance for that year will equal the amount of his yearly contribution to his family, less his personal expenses.”

Louisville & N. R. Co. vs. Trammell, 9 So. 870-873.

The judgment was for \$2,500. The wife of the deceased was the beneficiary. Upon appeal the judgment was modified and fixed at \$1,650. The Court, in holding that the judgment was excessive, say:

“But this is not all. It is manifest that, had Trammell lived, and spent \$300—all his earnings—on himself and wife for 27 years, there would have been at the end of that time nothing saved. Yet under this judgment the wife, as next of kin, would in that time receive and expend all she

would have gotten had he survived, and at the end of the period of his probable life still have \$2,500 or \$1,875 as the case may be, which she would not have received at all but for his death,—a net gain, over and above the pecuniary value of her husband's life, of the amount of the judgment after the lapse of 27 years. This, of course, is wrong. The true measure of damages manifestly is that which gives her such sum as, being put to interest will each year, by taking a part of the principal and adding it to the interest, yield \$150 and so that the whole remaining principal at the end of the twenty-seventh year, added to the interest on this balance for that year, will equal \$150. This sum we find to be approximately \$1,650, and judgment will be here entered for that amount."

McAdory vs. Louisville & N. R. Co., 10 So. 507-509.

The verdict of the jury was for plaintiff; new trial granted; upon appeal affirmed. The Court, at page 509, say:

"The verdict of the jury was for \$9,395.95. We presume that this sum was intended to cover the probable amount of his net earnings during the expectancy of life. Allowing that he worked every day, including Sundays, and received \$2.20 for each day, his annual gross earnings would have been \$803. The annual interest on the amount of the verdict is \$751.67, which, added to the principal, would produce at the end of the fortieth year \$39,462.75,—more than four times the value of the estate which the deceased would have ac-

cumulated by his labor had he lived the 40 years; fourfold the actual pecuniary loss suffered by the next of kin. It is obvious that the verdict goes far beyond any just rule of compensation, and is so largely in excess of the pecuniary value of his life to those entitled to inherit his estate as to render it the imperative duty of the court to grant a new trial."

In *Christensen vs. Floriston P. & P. Co.*, 29 Nev. 552, the father and mother were the beneficiaries, yet a judgment for \$10,000 was, upon appeal, reduced to \$3,000.

The Court erred in overruling defendant's demurrer to the amended complaint. The beneficiaries named in the complaint being those not legally dependent upon the deceased for support.

City of Friend vs. Burleigh, 74 N. W. 50, 51.

Orgall vs. Railroad Company, 64 N. W. 450.

Plaintiff attempted to cure this fatal defect by his two proposed amendments (Tr. pp. 24-25). The Court erred in permitting these amendments, over objection of defendant, for reasons assigned, in Assignment of Error II, Tr. pp. 295, 296.

^Cutting's Comp. Laws Ann., section 3163, which said section, in part, reads as follows:

"The Court may likewise, *upon affidavit showing good cause therefor*, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars." * * *

The Court erred in overruling defendant's demurrer to the amended complaint as amended by the two

separate amendments mentioned; the Court erred in overruling defendant's motion at the close of plaintiff's evidence to dismiss the action; and the Court erred in refusing to give defendant's requested instruction No. 1, which reads as follows: "I instruct you to return a verdict for the defendant," for reasons assigned in the errors assigned (Tr. pp. 296, 297, 300).

In support of said errors specified and assignments of error, above mentioned, to wit, Assignments of Error III, IV, and V, in addition to the authorities heretofore cited, we cite,—

Gulf, Colorado & Santa Fe Railroad Company,
Plaintiff in Error, vs. McGinnis, 228 U. S.
——, decided April 7th, 1913, reported in
advance sheets of date May 1st, 1913, page
426, as issued by Co-op. Publishing Com-
pany.

The case cited being especially applicable to the claim of plaintiff to a judgment by reason of contributions to Mrs. Charles Bogle, a married woman, sister of deceased.

The Court erred in refusing to give defendant's requested instruction No. 3, which is herein specified as error, being Assignment of Error VI, Tr. pp. 302, 303.

In support of said assignment of error, and in addition to the argument and authorities hereinbefore set forth, we cite,—

Burk vs. Railroad Company, 125 Cal. 364, 57
Pac. 1065, 73 American State Reports, 52.

In re California Nav. & Imp. Co. (Cal.) 110 Fed. 670.

From which opinion, at page 677, we quote as follows:

“The administrator of the estate of John T. Tulan is not entitled to recover, as the evidence will not warrant the Court in finding that his brothers and sisters, who are his only heirs, have suffered any pecuniary loss by reason of his death. The case of *Burk vs. Railroad Co.*, 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52, was an action brought by a sister and two brothers of one Burk to recover damages for his death, which was alleged to have been caused by the negligence of the defendant therein; and in construing the section of the statute above quoted the Supreme Court of California held that in an action brought by collateral heirs of a deceased person to recover damages on account of his death the mere fact that they are such heirs does not tend to show pecuniary damage, and, in the absence of other proof tending to show actual damages, or at least probable loss, resulting to them from his death, the recovery must be limited to nominal damages. The Court in that case said:

“It is said the fact that a right to sue is given implies that damages may be recovered although no rights of plaintiff have been violated. Confessedly, plaintiffs had no legal claim on deceased for anything, and he owed no duty to them to accumulate an estate and leave it to them. * * * The majority of men die without much property.

Whether the deceased would have succeeded in accumulating, and, if he had been successful, would have left it to plaintiffs, is matter of pure speculation. Such a guess as to probabilities is not, according to settled rules and maxims of the law, proper ground for the award of damages.' ”

As set forth in the opinion above quoted, and also in the case of *Burk vs. Railroad Company (supra)*, so in the case at bar, there is no evidence tending to show that deceased was in the habit of saving his wages, or that his brothers and sister had any reasonable expectation that he would ever give or leave to them, or any of them, anything of value.

In *Commercial Club vs. Hilliker*, 50 N. E. 578, the same being a death case, the Court, in reversing the judgment for plaintiff for \$2,750 say:

“It being true that the damages in cases like this *are limited to the pecuniary loss sustained by the next of kin* of the deceased, and there being no legal obligation resting upon the deceased to contribute to such next of kin, damages will not be presumed, but must be affirmatively proved. * * *

“*Juries are not warranted in giving damages based upon their fancy, nor are they warranted in assessing damages based upon visionary estimates of probabilities or chances. Matters purely of conjecture, it seems to us, are too vague to enter into an estimate of damages merely compensatory, as they must be in this case.*”

In *Christensen vs. Floriston P. & P. Co.*, 29 Nev. 552, 569, the denial of the request for an instruction similar to the one we are now considering, was sus-

tained. The Court, however, in disposing of the assignment of error, referred to the cases of *Burk vs. Arcata Ry. Co.*, *supra*, and *In re California Nav. & Imp. Co.*, *supra*, and in distinguishing the case then under consideration, wherein the beneficiaries were the father and mother of deceased, from the cases cited, wherein the beneficiaries were—as in the case at bar—collateral relatives, cited

Hillebrand vs. Standard Biscuit Co., 139 Cal.
233-237, 73 Pac. 163,

and quoted therefrom the following:

“Moreover, in the latter case (125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52) the action was brought by collateral relatives who under no circumstances could have any legal right to pecuniary aid from the deceased, while parents may have the legal right to financial support from a child, and at any time during its life.”

Thus showing that the Supreme Court of Nevada is in harmony with the Supreme Court of California and the Federal District Court of California in the construction of the death Statute where the beneficiaries are collateral relatives.

In the case at bar, deceased was a minor, living with and in the home of his father; the father was entitled to receive the wages of deceased, unless deceased had been emancipated. We have heretofore considered the testimony in reference to the emancipation. We do not believe the proof sufficient to show emancipation; further, if deceased had been emancipated, that fact would most probably have been set forth in the original amended complaint;

the allegation of emancipation was only inserted in the complaint by the amendment above referred to, after it was apparent that the complaint did not state facts sufficient to constitute a cause of action, without such allegation, and without the further allegation of contribution by deceased to the beneficiaries, to wit, the brothers and sister.

That the Court erred in refusing to give defendant's requested instruction No. 11, Assignment of Error VIII, Tr. p. 305, for the reasons therein stated, in addition to the reasons and authorities heretofore given and cited, we cite,—

Scofield vs. Pennsylvania Co., 149 Fed. 601-602,
from which we quote,—

“When a child is under age, the parents have a right to his earnings, and may therefore sue for the loss experienced by his death. But this right ends when he attains his majority, and, if death occurs before that, a recovery is limited in consequence to his probable earnings up to that time; ‘the chance of survivorship, his ability and willingness, after he should become of age, to support others,’ being too vague, as is declared, ‘to enter into an estimate of damages merely compensatory.’ ”

Deninger vs. American Locomotive Co., 185
Fed. 22, 34 et seq.

The Court erred in refusing to give defendant's requested instruction No. 7, Assignment of Error VII, Tr. p. 303, for the reasons there set forth, and as stated in the exception by defendant, taken at the time, as set forth in Tr. pp. 232, 233.

The Court erred in giving plaintiff's requested instructions Nos. 4, 5, 6, 7, and 8, Assignments of Error XI, XII, XIII, XIV, and XV, Tr. pp. 309-310, for the reasons therein specified, and for the reasons assigned at the time exceptions were taken, Tr. pp. 232, 233.

The Court erred in giving plaintiff's requested instructions Nos. 9 and 10, Assignment of Errors XVI and XVII, Tr. p. 311, for the reason that under the facts and law applicable thereto, there were no facts upon which to base the instructions given, and for the reason that by said instructions having been given, the jury must have concluded therefrom that they were authorized to determine the matter upon speculation without evidence, and to which there could be no possible evidence given, under the facts and authorities herein pointed out.

As to Assignments of Errors XVIII, XIX, and XX, having reference to the admission of testimony, Tr. pp. 312, 313, and as to Assignments of Errors XVI and XVII and XVIII, Tr. pp. 314-316, have, and each of same have been, heretofore considered.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

The reasons, given by the learned Judge in his opinion (Tr. pp. 280-289), for denying defendant's motion for a new trial, are at variance with all decisions, so far as we are advised, and at variance with the theory upon which the case was brought, and at variance with the instructions given; and the statements in the opinion are not consistent with each other.

We make the above statement, not as a captious criticism, but for the purpose of establishing that in the record and proceedings, as well as in the rendition of the judgment, manifest error has happened, to the damage of defendant: certain it is, that if defendant was entitled to a new trial, which was denied, error has been committed, which should be corrected in order that justice may be done.

While it is true, as a general rule, that appellate courts are not concerned with the reasons given by the trial court for the conclusion reached—it is also true that the reasons given may be considered as an aid in determining whether or not the trial Court correctly understood, and applied correct principles of law to the facts of the case.

In *Butch vs. Smith*, 90 Pac. 61, 63, the Court say:

“In an action in equity, it is discretionary with the Court to submit to a jury for its findings questions of fact; but the verdict of the jury is advisory merely, and the Court may approve or disapprove or modify the same. The instructions which the Court may give to the jury for its guidance, it has been held, are not subject to an assignment of error, and we are not reversing this judgment because of erroneous instructions. While this may be true, still, *a reviewing court may read them to ascertain if the trial Court knew the law of the case*, as well as to determine whether it took the right view of the evidence and its legal sufficiency.”

We submit that it is apparent from the opinion of the trial Court that if the Court had not erred in

its construction of the Nevada Death Statute, or if the Court had not erroneously applied its construction of the Statute to the case at bar, that defendant's motion for a new trial would have been granted.

It appears that the trial Court has construed the Statute as authorizing a recovery for the pecuniary value of the life of deceased, which pecuniary value of the life is not to be measured or restricted by the pecuniary injury suffered by the beneficiaries (named in the Statute), by reason of the death; but that "the jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just"; in other words, the Court construes the Statute to mean that the jury in every action brought under the Statute has the unlimited and unrestricted right and power to return a verdict for such an amount as they shall deem fair and just.

With this view of the Statute, the Court, no doubt, did reason as follows: The Statute vested in the jury the right and power to give such damages as they shall deem fair and just, the jury has returned this verdict, and, notwithstanding the fact that "It is not within the range of probability that the conditions which existed during the year preceding the death of Clarence Benner would continue indefinitely. Clarence was the youngest of the family. It is not to be assumed that during the whole expectancy of life, about 40 years, he would remain unmarried, and contribute so large a proportion of his earnings to his older brothers, and sister, who at the time of the trial were apparently in good health" (Tr. p. 287), and notwithstanding the fact that "\$7,000 is more

than I should have awarded under the instructions, but it is less, in my judgment, than the pecuniary value of the life of Clarence Benner. However, it is the judgment of the jury, not of the Court, as to what is just and fair, which the Statute requires" (Tr. p. 289)—therefore, it is my duty under the Statute to deny defendant's motion for a new trial; which was accordingly done.

We submit that the construction of the Statute by the trial Court, to the effect that the Statute authorizes a recovery of a judgment for such an amount as the jury shall deem fair and just, for the pecuniary value of the life of deceased, regardless of the fact that there has not been suffered by any person, pecuniary damage, is error.

We further submit, that even if it be conceded that such construction is correct, it was error to apply such construction to this case, for the reasons that the case was not tried upon such a theory, and could not have been so tried, because there existed the brothers and sister, who are named in the Statute as the beneficiaries, and who take all the proceeds of the judgment recovered, and their right of recovery is measured by the pecuniary loss sustained by them by reason of the death.

There is but one cause of action attempted to be stated in the amended complaint as amended by the two separate amendments; upon the trial, there was no proof offered, or attempted to be offered, showing any right to recover, except for the pecuniary injury or loss to, or suffered by, the beneficiaries named in the Statute; all right to exemplary damages

was specifically disclaimed, and the Court so instructed the jury. It is therefore clear that the verdict of the jury is for pecuniary injury or loss to, or suffered by, the beneficiaries named in the Statute.

If there be two causes of action given by the Statute, as was held by Hillyer, J., in *Roach, Admr., vs. Imperial Mining Co.*, 7 Fed. 698, one for the injury to the deceased and one for the kindred named in the act—two causes of action would of necessity be stated in the complaint; and if both were not so stated, it is clear that the one not stated would be waived.

In *Peers vs. Nevada Power Light & Water Co.*, 119 Fed. 400, Hawley, J., held that the Statute only gave one cause of action, saying, “but in applying the ordinary and well-established canons of construction to be given to the statutes, it does not seem reasonable that the legislature intended to give two independent causes of action for the same injury, *which causes of action would have to be separately stated in the complaint.*”

In *Christensen vs. Floriston P. & P. Co.*, 29 Nev. 552, 570, the Court say:

“In one sense no amount of money might compensate for a human life, but the law only looks at the question from the point of *actual monetary damage sustained by the person for whose benefit the action is brought*, and not that inflicted upon the decedent.”

This statement by the Supreme Court is not consistent with the theory of a recovery for the pecuniary value of the life of deceased; it clearly shows

that the judgment is to be measured by the actual pecuniary loss or injury suffered by the beneficiaries.

Under the construction of the Statute by the trial court,—if the public administrator should institute an action to recover damages for the wrongful death of a young man who had never married, who had no brother or sister, whose father and mother were dead, who had no beneficiaries named in the Statute, and who left no person whomsoever who had suffered any pecuniary injury by reason of the death—yet notwithstanding this state of facts, if the jury should return a verdict for several thousand dollars, then and in that event the Court would not disturb said verdict, but would say, as the trial Court said, at Tr. p. 289, “It is less than the pecuniary value of the life of deceased; however, it is the judgment of the jury, not of the Court, as to what is just and fair, which the Statute requires.”

We do not believe that such is the proper construction of the Statute, and that such construction is not in harmony with any authority.

The above Statute creates a new and distinct right of action, in so far as this case is concerned, for the benefit of the beneficiaries named in the Statute, and if the beneficiaries named, and for whose benefit the action was brought, are not such under the facts, and are not shown to have sustained pecuniary injury, plaintiff is not entitled to recover.

From *Peers vs. Nevada Power, Light & Water Company*, *supra*, 119 Fed. 403, we quote:

“This act is not a ‘survival act’ in the strict sense of that term. * * * The evident inten-

tion of the legislature * * * was to afford a complete and adequate remedy for a recovery in one action of all damages, whether compensatory or exemplary, which might result from the death of the deceased, and for the distribution of the damages recovered *to the persons* entitled to the same in the manner described in the second section of the act."

From pages 404-405, we quote:

"Under the express provisions of the Statute the action must be brought by the representative of the deceased, and he alone is entitled to recover damages, if any, resulting from the death of Wells by the wrongful act of the defendant,—not for his own individual benefit *but for the benefit of those to whom* the damages recovered are to be distributed as provided for in the second section of the act."

Michigan Central R. R. Co. vs. Vreeland, 227
U. S. 59.

We submit that these two opinions conclusively show that the act gives a new cause of action, and that the measure of damage is *not* the pecuniary value of the life, but is the pecuniary injury sustained by the beneficiaries named in the Statute by reason of the death.

That the phrase in the Statute "the jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named," is not subject to the construction given it by the trial

Court in the opinion (Tr. pp. 282-284). We call attention to the fact that other States have similar Statutes, and that such language in the statute does not warrant the jury in giving damages not founded upon the testimony or beyond the measure of compensation for the injury inflicted.

In this connection we cite, and quote from,

Walker vs. Lake Shore & M. S. Ry. Co. (Mich.), 62 N. W. 1032-1035, as follows:

“The statute (section 8314, How. Ann. St.) provides that ‘in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered.’ This statute has been construed many times by this Court. In Railroad Co. vs. Bayfield, 37 Mich. 212, it was held that in arriving at the damages the actual pecuniary loss of the widow or next of kin should alone be considered. In Cooper vs. Railway Co., 66 Mich. 271, 33 N. W. 306, it was said: ‘Under this statute, the jury are not warranted in giving damages not founded upon the testimony or beyond the measure of compensation for the injury inflicted. *They cannot give damages founded upon their fancy, or based upon visionary estimates or probabilities or chances.* The rule of damages in actions for torts does not apply to actions of this kind. The statute gives the right to damages; but it has been held, with rare exceptions, that they must be confined to those damages

which are capable of being measured by a pecuniary standard.' "

We submit, therefore, if it be true under the statute, that the pecuniary value of the life of deceased, as distinguished from the pecuniary injury suffered by the beneficiaries by reason of the death, may be recovered, in any case, for the benefit of the estate or the State—it is perfectly clear that such construction or interpretation of the statute has no bearing on this case, as deceased left him surviving beneficiaries named in the statute, to wit, brothers and sister.

Jennings vs. Alaska Treadwell Gold M. Co., 170
Fed. 146-148.

And if, under the proof, the beneficiaries named and existing have not suffered pecuniary injury such as is contemplated, as is stated in Christensen vs. Floriston P. & P. Co., 29 Nev. 570, and in Burk vs. Arcata Ry. Co., *supra*, 57 Pac. 1065, and in In re California Nav. & Imp. Co., *supra*, 110 Fed. 677, the assignments of error specified covering these matters were well taken, and the judgment should be reversed.

We respectfully submit that the judgment should be reversed.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Plaintiff in Error.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 2284.

TRUCKEE RIVER GENERAL ELECTRIC COM-
PANY, a Corporation,

Plaintiff in Error.

vs.

A. S. BENNER, as Administrator of the Estate of
CLARENCE J. BENNER, Deceased,

Defendant in Error.

Brief for Defendant in Error.

The District Court, in its opinion upon the motion for new trial, says: "The motion for new trial is made on thirty-four distinct grounds, only one of which appears to have received serious attention in the briefs. This ground is the fifth, that the verdict of the jury is excessive." (Tr. 280). The same condition exists in this court. Here we have twenty-three separate assignments of error; but the only one seriously argued is the alleged excessiveness of the damages. This is not a matter for the consideration of this court upon writ of error, there being evidence

of damage, and the damages assessed being less than the sum named in the complaint.

N. Y. L. E. & W. Co. v. Winters, 143 U. S. 60; 36 L. Ed., 60;

Herencia v. Guzman, 219 U. S. 44; 55 L. Ed. 81;

Homestake M. Co. v. Fullerton, 69 Fed., 923;

Joplin & Pac. Ry. Co. v. Payne, 194 Fed., 387;

C. B. & Q. R. Co. v. Upton, 194 Fed., 371;

C. & E. R. Co. v. Ponn, 191 Fed., 682;

St. L. & W. R. Co. v. Kountz, 168 Fed. 832;

Beaver Hill Coal Co. v. Lassilla, 176 Fed., 725;

Duke v. St. L. & S. R. Co., 172 Fed., 684;

As is said by the Supreme Court in the case of N. Y. L. E. & W. R. Co. v. Winters, *supra*,

“Whether the verdict was excessive, is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here. As stated by us in *Aetna L. Ins. Co. v. Ward*, ‘It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.’ ”

In the light of this rule we will examine in their order, number by number and paragraph by paragraph, all the

assignments specified as relied upon by the brief of plaintiff in error.

ASSIGNMENT I.

The error here assigned is not specified by the brief of plaintiff in error as being relied upon, and is, therefore, under rule 24 of this court, not to be considered.

ASSIGNMENT II.

This assignment covers the allowance of two amendments to the amended complaint. While it does not clearly appear from the transcript when, with reference to the trial, these amendments were allowed and made, it does appear from the brief of plaintiff in error, page 2, that they were allowed and made at the close of the plaintiff's evidence upon the first trial. They were made to conform to the evidence. These amendments appear at pages 23 and 24 of the transcript, and added to the complaint the allegations of the emancipation of the deceased and the pecuniary loss to the beneficiaries of this action. The objections to the allowance of these amendments were two; first, that no affidavit showing good cause for the allowance of the amendments, as required by section 68 of the Civil Practice Act of Nevada; and, second, that the amendments stated a new cause of action.

1. It is not required that all amendments be supported by affidavit. Plaintiff in error quotes but a part of the provisions of the Nevada statute upon this subject. The whole of the section covering this subject is as follows:

“The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may upon like terms enlarge the time for an answer or demurrer, or demurrer to an answer filed. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may upon like terms allow an answer to be made after the time limited by this Act; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and when, from any cause, the summons, and a copy of the complaint in an action have not been personally served on the defendant, the court may allow on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.”

The Nevada statute as to amendments, and the Federal statutes upon that subject, are very broad, and are liberally construed by the courts, amendments in furtherance of justice being greatly favored. Their allowance at

the time of and during the course of the trial, or at its close, to conform to the proof, or to permit the introduction of relevant evidence which has been objected to, lie within the discretion of the court, come within its inherent powers, and form a part of the common practice of all courts.

McCausland v. Ralston, 12 Nev., 195;

Jeffree v. Walsh, 14 Nev., 140;

Shields v. Orr Ditch Company, 23 Nev., 349.

It is held by the Federal courts of appeal that the allowance of such amendments lies within the discretion of the trial court, and will not be reviewed upon writ of error.

Buchannan v. Cleveland Linseed Oil Co., 91 Fed. 88;

N. O. & T. P. R. Co. v. Gray, 101 Fed. 623;

Union Central L. Ins. Co. v. Phillips, 102 Fed. 19;

Lange v. U. P. R. Co., 126 Fed., 338;

Mont. M. Co. v. St. L. M. & M. Co., 147 Fed. 897.

2. The complaint, as amended, did not set forth a new or different cause of action from that stated in the original complaint. We find no authority, nor has any been cited by plaintiff in error to the effect that an allegation of emancipation is necessary to the statement of a cause of action in behalf of the brothers and sisters of a deceased minor under the Nevada statute, or like statutes of other states. Were the wages of the minor either the subject matter of the action or the measure of damages, such an allegation might be necessary. But the measure of damages under this Act is the pecuniary loss of the

beneficiaries of the action, and that loss may be as well sustained by them whether the deceased be a minor or of age. We doubt, also, the necessity of the allegation of the specific nature of the pecuniary injury to the beneficiaries of the action. But, however that may be, the most that can be said is that the original complaint, with these omissions, defectively stated a good cause of action, and did not state a defective cause of action. Both the original complaint and the complaint as thus amended stated the same cause of action. The amendments related to the same cause of action, to-wit, the negligence of the defendant, and sought only to amplify the grounds upon which damages were claimed. Their allowance was therefore proper.

Deninger v. Amer. Locomotive Co., 185 Fed. 33;
 Chicago & E. R. Co. v. LaPorte, 71 N. E. (Ind.) 166;
 Daly v. Boston & A. R. Co. 16 N. E. (Mich.) 690;
 Garrity v. Detroit Cit. St. Ry. Co. 70 N. W. (Mich.)
~~112~~, 1018
 C. R. I. & P. R. Co. v. Young, 93 N. W. (Neb.) 922.

The plaintiff in error answered the complaint as finally amended, and thereby waived its right to complain that a new cause of action was introduced. (I Ency. P. & P. 573, and cases cited.)

ASSIGNMENT III.

This assignment sets forth as error the overruling of the demurrer to the complaint as finally amended, upon

the ground that the complaint so amended did not set forth facts sufficient to constitute a cause of action. This we are willing to submit without argument or citation of authorities.

ASSIGNMENT IV.

This assignment covers the refusal of the court to grant a motion of the plaintiff in error to dismiss the action at the close of the plaintiff's case, and there are eleven separate reasons stated for this alleged error. They involve mostly matters of evidence,—and we here call the attention of the court to the fact that no evidence was offered upon the part of the defendant, here plaintiff in error. We will discuss each of the eleven reasons separately.

1. To the first reason it is sufficient answer to say that there was ample evidence of the negligence of the defendant, and that that negligence was the proximate cause of the death of deceased; and there was no evidence to the contrary. The weight or sufficiency of the evidence is not a matter for the consideration of this court upon writ of error.

2. "Emancipation need not be proved by direct evidence; it may be proved by circumstantial evidence; and the acts of the parties tending to show that the child acted for himself, with the knowledge and approval of the parent, are admissible as tending to show an implied emancipation." (9 Ency. ~~P. & P.~~, 281 and cases cited.)

Evidence

The testimony of the father (Tr. 168-171) furnishes some evidence, and we think conclusive evidence, of the emancipation of the deceased; and this court will not review the weight of that evidence.

3. There was uncontradicted evidence of many gifts or contributions of the deceased to his brothers and sister, who are the beneficiaries of this action. The deprivation of future gifts or contributions which might have been made had deceased lived, is an element the jury have a right to consider in determining both the fact of loss and the extent thereof. Thus we have again a question merely of the weight of evidence, which will not be considered by this court.

4. It is true that at the time of his death the deceased was a minor, and under no obligation to contribute to the support of his brothers or sister; but it is likewise true that the statute of Nevada gives a right of action for the benefit of the brothers and sister, and does not make it necessary that the deceased be under obligation to contribute to their support. No such condition or qualification can be found in the Act. It is true, likewise, that had the deceased not been emancipated, the father would have been entitled to the earnings of deceased until his majority. This, however, is a right of the father which he may waive, (29 Cyc, 1626-1627); and the earnings then become the property of the minor, (29 Cyc, 1628). The gifts and contributions in this case were gifts and contributions from the funds of the deceased; and it is a mere quibble to say they were gifts of the father because they were from the earnings of the child to which the father might have, but did not assert his right.

5. This paragraph raises the identical question in the last paragraph discussed, and is met with the same answer and authorities.

6. No loss of the father was included in the action or verdict; all right to damages by him was specifically disclaimed by the plaintiff, here defendant in error. The jury were instructed that they could not consider any loss or damage suffered by the father. (Tr. 221).

7, 8, 9. These three paragraphs raise the same questions to be found in paragraph three of this assignment, and have been fully dealt with under that heading.

10. It is a sufficient answer to this paragraph to say, that this is not an action by the father, or anyone else, for the loss of earnings of the deceased between the time of his death and the time at which he would have arrived at his majority. This loss is not part of the cause of action given by the statute to the beneficiaries of the action.

11. Whether the Charles Butters Company, the employer of the deceased, was negligent or not, there was evidence of negligence of the plaintiff in error also. It was for the jury under all the evidence to determine whose was the negligence which proximately and directly caused the death of deceased. This objection raises only a question of the weight of evidence, which this court will not consider upon writ of error.

ASSIGNMENT V.

This assignment covers the refusal of the court to instruct the jury to return a verdict for the defendant. The reasons assigned are eight in number, and are the same reasons assigned why the court should have granted the motion to dismiss, covered by Assignment IV. They all go to the weight or sufficiency of the evidence, and are not reviewable here.

ASSIGNMENT VI.

This assignment covers the refusal of the court to give defendant's instruction No. 3. This instruction was properly refused, because it assumes facts not shown by the evidence. For instance, it assumes that the deceased did not make contributions to his brothers or sister before his death, while the uncontradicted evidence shows that he did; and these contributions were made from his own funds, since they were from his earnings, which his father permitted him to collect, retain and dispose of (29 Cyc, 1628).

ASSIGNMENT VII.

This assignment covers the refusal of the court to give defendant's instruction No. 7. That instruction does not correctly state the law, in that by it the jury would have been permitted to take into consideration, in arriving at

their verdict, some assumed negligence of the Charles Butters Company, the employer of the deceased. The evidence disclosed no negligence upon the part of that company. Even had there been such negligence, there being also evidence of negligence upon the part of defendant, plaintiff in error here, the question for the jury was as to whose negligence was the proximate and direct cause of the death of the deceased. This question was properly submitted to the jury by the charge of the court.

ASSIGNMENT VIII.

This assignment covers the refusal of the court to give defendant's instruction No. 11. That instruction did not properly state the law of the State of Nevada, or of this case. This was not an action to recover for the loss of earnings of the deceased up to the time of his majority. Both of the cases, *Scofield v. Penn. Co.* 141 *Fed.*, 601, and *Deninger v. American L. Ins. Co.*, 185 *Fed.*, 22, cited by plaintiff in error in support of this instruction, are instances in which the Federal courts of Pennsylvania followed the decisions of the Supreme Court of that state in its interpretation of the Pennsylvania statute, which was proper. The Supreme Court of Nevada, in the case of *Christiansen v. Floriston P. and P. Co.*, 29 *Nev.*, 552, has fixed the rule as to the measure of damages in death actions under the Nevada statute; and the trial court instructed the jury properly in this regard.

ASSIGNMENT IX.

The error, if any, covered by this assignment is not specified by the brief of plaintiff in error as intended to be relied upon, and will not, therefore, under rule 24 of this court, be considered.

ASSIGNMENT X.

This assignment covers the refusal of the court to give defendant's instruction No. 13. This instruction would have confined the jury to the consideration of the loss of but one of the beneficiaries of the action, the sister of deceased, Mrs. Charles Bogle. The giving of this instruction would clearly have been error, since other beneficiaries of this action were shown by the evidence to have received contributions, aid and financial assistance from the deceased during his life time, just as Mrs. Bogle did.

ASSIGNMENTS XI, XII, AND XIII.

These three assignments cover instructions given by the court, at the request of plaintiff, as to the degree of care required of those who maintain and use wires charged with a deadly or dangerous current of electricity. Electricity is the most dangerous and deadly force under the control of man, and in its use it is proper that the highest degree of care be required, since this is only rea-

sonable and ordinary care as applied to this agency. It is certainly true that the greater the degree of danger, the greater the degree of care required. As a matter of fact, the "degree" of care required is hardly a matter for consideration in this case, since the evidence showed absolutely no care whatsoever. The dangerous position of the electric wires was brought to the attention of the defendant some weeks prior to the accident; its attention was directed to it several times in this interval; but nothing whatsoever was done to remove the danger. There are many decisions upholding instructions requiring the degree of care set forth in the instructions given, and even a greater degree of care.

Denver Cons. Elec. Co. v. Lawrence, 73 Pac. (Colo.) 39;

Metropolitan St. Ry. Co. v. Gilbert, 78 Pac. (Kan.) ~~261~~; 807

Mangan's Adm. v. Louisville Electric Co., ~~73~~ 9/ S. W. (Colo.), ~~654~~; 703

Perham v. Portland Gen'l Elec. Co., 53 Pac. (Ore.), 14;

Daltry v. Media Elec. L. H. & P. Co., 57 Atl. (Pa.), ~~414~~; 833

Giraudi v. Elec. Imp. Co., 107 Cal., 120;

Herbert v. Lake Charles L. L. & W. W. Co., 100 Am. St. (La.) 505, and Note at 516.

ASSIGNMENT XIV.

This assignment covers the giving of plaintiff's instruction No. 7 (Tr. 310). This instruction so manifestly

states the elementary law as to corporations and their relation to their employes, agents and officers, that we deem the assignment unworthy of discussion.

ASSIGNMENT XV.

This assignment is not specified by the brief of plaintiff in error as relied upon or intended to be urged, and will not, under rule 24 of this court, be considered.

ASSIGNMENT XVI.

This assignment sets forth as error the giving of plaintiff's instruction No. 9. In this instruction all the material facts alleged in the complaint, as finally amended, were set forth; and the jury were told that if, from the evidence, they found these facts to be true, the plaintiff was entitled to recover. To argue this instruction would be but to reargue the sufficiency of the complaint.

ASSIGNMENT XVII.

This assignment sets forth as error the giving of plaintiff's instruction No. 10, which covered the measure of damages, together with the facts the jury might consider

in determining their amount. The instruction is practically in the words used by Tiffany, in his work, "Death by Wrongful Act," approved as a correct statement of the law by the Supreme Court of Nevada in the case of Christiansen v. Floriston P. & P. Co., 29 Nev., 552, at page 574.

ASSIGNMENT XVIII.

This assignment sets forth as error the ruling of the court permitting A. S. Benner, the father of the deceased, to testify, first, to the amount contributed by the deceased towards the maintenance of the home of the witness and deceased, and, second, that he, the witness, did not receive all the earnings of his minor son, the deceased.

1. According to the testimony of Mr. Benner (Tr. 163), there were residing at the Benner home, at and prior to the time of the accident, the father, the deceased, and two of his brothers—four in all. The witness testified (Tr. 166), that one of these brothers, George, and the deceased paid all the expenses of the household, the other brother, Will, contributing nothing regularly (Tr. 174). The witness also testified (Tr. 166) that the deceased contributed some forty to fifty dollars per month, and (Tr. 167) that the total expenses of the household were between eighty and ninety dollars per month. It thus appears that the deceased was contributing more than his proportionate share of the household expenses, and thus indirectly contributed to the support of his brother Will, who contributed nothing. This testimony of the father was, there-

fore, relevant and material. It certainly can make no difference that the contributions thus proven were indirectly, rather than directly, made. The evidence was offered to prove these indirect contributions, and was admitted for that purpose by the trial court (Tr. 165).

2. The testimony that the father did not receive all the wages of the minor, but permitted him to retain and dispose of a large part thereof, is certainly relevant and material in that it tends to prove the emancipation of the minor. (29 Cyc. 1675, and Note, 92; ~~10~~ Enc. Ev., 283).

9

ASSIGNMENT XIX.

This assignment sets forth as error the ruling of the court permitting Mrs. Charles Bogle to testify as to the contributions made to her by the deceased prior to his death. Mrs. Bogle was a sister of the deceased, and, therefore, one of the beneficiaries of this action. The contributions to which she testified were proper to be considered by the jury in estimating the damages, and the evidence was, therefore, relevant and material. The theory of plaintiff in error upon this objection was, that the deceased being a minor, the father was entitled to his wages; and that the contributions were, therefore, contributions by the father, rather than by the deceased. This question has heretofore been disposed of.

ASSIGNMENT XX.

This assignment covers similar testimony to that of Mrs. Bogle, given by the brother, William H. Benner, and is subject to the same justification as her testimony under Assignment XIX.

ASSIGNMENT XXI.

This assignment is to the effect that the verdict of the jury was excessive. Since there is ample and uncontradicted evidence of damage, and the amount found by the verdict is within the amount claimed by the complaint, this court upon writ of error will not consider whether the damages were excessive or not. The authorities supporting this rule, including an opinion of this court, are to be found following the first paragraph of this brief.

ASSIGNMENTS XXII AND XXIII.

These assignments are to the effect that the verdict of the jury was contrary to the evidence and to the law. The specifications of error under these assignments all go to the weight and sufficiency of the evidence. Evidence was introduced upon the part of plaintiff covering and sustaining every material allegation of the complaint, and no evidence was offered by the defendant. There being no error in the admission of evidence, this court will not consider its weight or sufficiency.

Toledo St. L. & W. Ry. Co. v. Kountz, 168 Fed., 832;

• Beaver Hill Coal Co. v. Lassilla, 176 Fed., 725.

The brief of plaintiff in error specifies, in addition to the foregoing assignments, the overruling of the motion for new trial as an error relied upon. This also is a matter not to be considered upon writ of error.

Brazil Block Coal Co. v. Hotel, 192 Fed., 108;

O'Donnell v. N. Y. Trans. Co., 187 Fed., 109;

E. I. DuPont Co. v. Waddell, 178 Fed., 407.

ARGUMENT.

Whether, under the Nevada statute, there are two causes of action as held by Judge Hillyer in the Roach case, or but one cause of action, as held by Judge Hawley in the Peers case, we think has no bearing upon the issues presented upon this hearing.

We quite agree with counsel for plaintiff in error, that the theory of defendant in error throughout this case was, and is, that he is entitled to recover only the pecuniary loss suffered by the brothers and sister of deceased by reason of his death; and that the value of such damage or loss is to be fixed at the present worth of the amount which it is reasonably probable the deceased would have contributed to his brothers and sister, had he lived, during his and their expectancy of life. The rule laid down in *Riter-Connelly Mfg. Co. v. Hamlin, Louisville & N. R.*

Co. v. Trammel, and *McAdory v. Louisville & N. R. Co.*, cited by counsel for plaintiff in error at pages 34 and 35 of their brief, do not militate against this rule. In fact they announce it, and do but point out a way of determining the present worth of the loss or damage.

The trial court, in its opinion upon the motion for new trial, expressed a different interpretation of the statute. The statute is subject to the interpretation the trial court placed upon it, and similar statutes have been so interpreted by other courts. It was the opinion of the trial court that the jury were not limited by the statute to the actual pecuniary loss of the beneficiaries, but that the jury might go further, and allow whatever sum they deemed fair and just under all the circumstances, taking into consideration other matters than the pecuniary loss, i. e., the value of the life itself. Counsel for defendant in error held other views; and the court, at their request, gave instructions embodying the narrowest rule possible under the statute, that is, confining the damages to the actual pecuniary loss of the beneficiaries of the action as shown by the evidence. The fact that the court entertained a different opinion as to the law, and expressed the same in its opinion upon the motion for new trial, can have no bearing upon the judgment of this court if the jury were properly instructed upon the trial. They were properly instructed. The court followed the rule laid down by the Supreme Court of Nevada in the Christiansen case, and we think the weight of authority in other states supports that rule. Certainly the plaintiff in error suffered no harm from the adoption of the narrower rule, even if the broader rule were proper.

But, it is contended by counsel for plaintiff in error, the court believed the verdict to be excessive under the narrower rule, and only allowed it to stand because of its belief in the broader rule. The language of the court does not warrant this conclusion. The language referred to is as follows: “\$7,600 is more than I should have awarded under the instructions, but it is less, in my judgment, than the pecuniary value of the life of Clarence Benner.” (Tr. 289). The court says that seven thousand dollars is more than it would have awarded under the instructions; but it does not say how much more. This is a common expression of the courts, and is to be found in many of the reported decisions upon motions for new trial. That the court recognized and had in mind the correct rule of law, is evidenced by its language in the sentence next preceding the quotation; for it there says that the verdict was not so excessive that it must have been rendered under the influence of passion or prejudice. And at another place in the opinion (Tr. 287) the court says: “It must further be noted that there was nothing in the conduct of the case calculated to rouse any passion or prejudice on the part of the jury.” Again, that the court did not take into consideration its version of the law in determining whether or not the damages were excessive, is clearly evident from another part of the opinion. It said, (Tr. 286) “Whatever my opinion as to the true interpretation of the statute and the measure of damages recoverable in cases of this kind, it seems to me that I am bound by the instructions given at the request of the plaintiff. *I cannot now award a more favorable rule than that adopted at plaintiff’s request.*”

It must certainly be manifest that the trial court had in mind the law as announced by the instructions, and that it did not consider the damages so excessive under those instructions as to appear to have been given as the result of passion or prejudice, or to be grossly in excess of the amount it would have allowed. The court gave to the jury the proper rule in the instructions, and it followed the proper rule in its decision upon motion for new trial. This court, therefore, in accordance with its own rulings, and the rulings of other Federal courts of appeal, will not consider the specification that the verdict was excessive or against the weight of the evidence.

There is shown by the whole record no error, or ruling possible of doubt as to its correctness. By far the larger part, nearly the whole, of the assignments of error and specifications of error relied upon, pertain to matters which counsel for plaintiff in error knew, or should have known, are not within the province of this court to consider upon this hearing. It seems manifest that the writ of error was sued out merely for delay; and the penalty provided by rule 30 of this court ought to be inflicted.

Respectfully submittted,

MACK & GREEN and A. A. HEER,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY A. MEESE, MAY MEESE, EDITH MEESE,
ANNA MEESE, ALFRED MEESE, a Minor,
CATHERINE MEESE, a Minor, LIZZIE MEESE,
a Minor, WILLIE MEESE, a Minor, BENNIE
MEESE, a Minor, by Their Guardian ad Litem,
MARY A. MEESE,

Plaintiffs in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Western District of Washington,
Northern Division.

FILED

AUG 13 1913

No. 2287

United States
Circuit Court of Appeals

For the Ninth Circuit.

MARY A. MEESE, MAY MEESE, EDITH MEESE,
ANNA MEESE, ALFRED MEESE, a Minor,
CATHERINE MEESE, a Minor, LIZZIE MEESE,
a Minor, WILLIE MEESE, a Minor, BENNIE
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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Caption.]

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Error,

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[1*]

[Complaint.]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

MARY A. MEESE, MAY MEESE, EDITH
MEESE, ANNA MEESE, ALFRED MEESE,
a Minor, CATHERIN MEESE, a Minor,
LIZZIE MEESE, a Minor, WILLIE MEESE,
a Minor, BENNIE MEESE, a Minor, by Their
Guardian ad Litem, MARY A. MEESE,
Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,
Defendant.

*Page-number appearing at foot of page of original certified Record.

Plaintiffs herein complaining of the defendant company say:

I.

That on the 12th day of April, 1913, Benjamin Meese, deceased, received injuries through the carelessness and negligence of the defendant company and from said injuries the said Benjamin Meese died on the morning of the 17th day of April, 1913, in the city of Seattle, King County, Washington.

That the deceased, Benjamin Meese, left surviving him, his wife, plaintiff herein, Mary A. Meese; and also eight (8) children, also plaintiffs herein, to wit:

May Meese, of the age of twenty-two (22) years,

Edith Meese of the age of twenty (20) years,

Annie Meese of the age of eighteen (18) years,

Alfred Meese of the age of sixteen (16) years,

Catherin Meese of the age of thirteen (13) years,

Lizzie Meese of the age of twelve (12) years,

Willie Meese of the age of nine (9) years,

Bennie Meese of the age of six (6) years.

That all of said plaintiffs are citizens of the State of Washington, [2] residing in Seattle, King County, Washington.

That on the 29th day of May, 1913, Mary A. Meese was appointed by this Honorable Court guardian ad litem of the above-named minor children for the purpose of commencing and prosecuting their action against the Northern Pacific Railway Company, defendant herein, jointly with the surviving wife and other surviving children of Benjamin Meese.

That the Northern Pacific Railway Company is at this time, and was at all the times herein mentioned,

a corporation organized and existing under the laws of Wisconsin, owning and operating a railway system carrying freight for hire in the State of Washington and at the times and places hereinafter mentioned.

II.

On the 12th day of April, 1913, and for a long time prior thereto, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company, in its plant located at Georgetown in the city limits of the city of Seattle, King County, Washington; and as part of his duty under his employment with the said Brewing Company was to assist in loading beer upon the cars and also to place Government stamps upon the barrels half barrels, quarter barrels when filled with beer and before the same were loaded into the railroad cars spotted at the proper place at said Brewing plant for said loading. That at the plant, the said defendant had a railroad track running alongside of the wire house and buildings containing the finished products to be shipped by said Brewing Company, which said siding was connected with defendant company's switches, siding and main tracks; and the said defendant company furnished the said Brewing Company with cars on said track to be loaded with products of said plant to be [3] carried by said defendant company to their different points of destination. That after the said cars are placed upon said siding of said defendant company, the cars were spotted and moved by the Brewing Company to different places necessary for the loading on said siding, with appli-

ances furnished and operated by the said Brewing Company; and when the said cars were so placed upon the said siding and spotted at the proper places for loading the cars, said Brewing Company used skids and other appliances extending from the car into the wire house of the Brewing Company, for the purpose of rolling the kegs, barrels, quarter barrels or half barrels of the finished product of the Brewing Company from the plant into the car; and the said Brewing Company employed a crew of men called loaders for the purpose of loading said car with their said finished product and also with ice sometimes necessary in the shipment of the said finished product, and at the same time of loading the said car the said Brewing Company employed workmen to place the necessary Government stamps upon each of the receptacles of the said finished product, which was usually done while said receptacles were moving along the said skids; and the workmen who performed said work usually stood upon the floor or platform beneath the skids and which platform ran alongside of the building and plant of the Brewing Company and into the opening in the building or plant where the finished product was taken from the storehouse or plant. That while loading and filling the said car, the movement of the said car, especially without notice to the loading crew and the employee who placed the Government stamps upon the receptacles, was dangerous to the workmen of the Brewing Company, as the movement of the said car would cause the skids and receptacles of the finished product [4] to fall upon the employees of the

Brewing plant and injure them.

III.

That at the time of the accident herein complained of, the deceased husband and father was placing Government stamps upon the receptacles, half barrels of the finished products of the Brewing Company, in his regular course of employment with the Brewing Company, and located to the south of the skids and half barrels as they moved from the plant of the Brewing Company into the car.

IV.

That while the said deceased, Benjamin Meese, was so employed placing the Government stamps upon the half barrels and filling and loading a car upon said siding, on the 12th day of April, 1913, at about the hour of 6:10 o'clock of the evening of said day, the said defendant company, by and through its switchman, locomotive engineer and employees carelessly and negligently without warning to the deceased, Benjamin Meese, and without warning to any of the loading crew, then in the employ of the said Brewing Company loading the car upon the said siding, knowing that said men were at that time loading the car, caused a number of cars to come down the said siding alongside of the plant of the said Brewing Company with tremendous force and momentum, striking the car then being loaded with tremendous force and momentum, knocking the car along the track causing the skid then being used by loading crew to load the said car to fly backwards and against the deceased, causing large number of half barrels loaded with the finished product of the

Brewing Company upon the said skids to fall upon the deceased, maiming and injuring him so that from said injuries so received through the carelessness and negligence of the defendant company the said Benjamin Meese, deceased, [5] died on the morning of the 17th day of April, 1913, leaving his widow and children, parties plaintiff herein.

V.

That immediately after the accident and injury to Benjamin Meese, deceased, plaintiffs herein employed a surgeon and doctor for the purpose of treating and caring for the deceased, and that the said doctor and surgeon attended the deceased during the several days he lived, performed operations, and that the service so rendered are of the reasonable value of Two Hundred and Fifty (\$250.00) Dollars. That the plaintiffs herein removed the deceased during his illness to the hospital and incurred a liability there of Forty and 53/100 (\$40.53) Dollars. That the burial of the deceased caused the plaintiffs herein the sum of about Four Hundred and Twenty-five (\$425.00) Dollars.

VI.

That at the time of the accident herein complained of the deceased Benjamin Meese, was fifty-two (52) years of age, an able-bodied, strong and healthy person, earning and able to earn about ninety (\$90.00) dollars per month, living with and supporting his family, consisting of himself and the parties plaintiff herein. That he was a loved and loving husband and father, devoting his services, attention and care upon his family, educating his minor children, rear-

ing them in culture and giving them intellectual, moral and physical training as becomes a father. That the plaintiffs herein are damaged through the wrongful death of their husband and father, through the negligence and carelessness of the defendant company in the sum of Twenty-five Thousand Seven Hundred Fifteen and 53/100 (\$25,715.53) Dollars.

Wherefore, plaintiffs pray judgment against the [6] defendant in the sum of Twenty-five Thousand Seven Hundred Fifteen and 53/100 (\$25,715.53) Dollars, together with their costs and disbursements herein.

TEATS, TEATS & TEATS,
Attorneys for Plaintiff. [7]

[Verification.] [8]

[Caption.]

Demurrer.

Comes now the defendant Northern Pacific Railway Company, a corporation, and entering its appearance herein, demurs to the complaint of the plaintiffs, and for grounds of demurrer states:

I.

That the plaintiffs' complaint fails to state facts sufficient to constitute a cause of action against the defendant for the reason:

a. That there is no sufficient statement of facts set forth in said complaint to show that the accident referred to therein was the result of negligence or want of care on the part of the defendant.

b. That there is no authority in law under which the plaintiffs' action can be maintained as against

this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries of which complaint is made, at the place of work and plant of his employer, and that plaintiffs' claim comes within the terms of Chapter 74 of the Session Laws of the State of Washington for 1911, being an act relating to [9] compensation of injured workmen.

II.

That the Court has no jurisdiction of the subject matter of this action, the injuries to the plaintiffs' decedent having occurred while he was employed at the works and plant of his employer, and all rights of action by reason of the matters set forth in the plaintiffs' complaint have been withdrawn from the jurisdiction of the Court by Chapter 74 of the Session Laws of Washington for 1911 known as the Workmen's Compensation Act.

III.

That there is a defect of parties plaintiff.

C. H. WINDERS,
Attorney for Defendant.

[Verification.] [10]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2489.

MARY A. MEESE et al.,

Plaintiffs,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant.

**Order Sustaining Demurrer and Judgment of
Dismissal.**

BE IT REMEMBERED that this cause came on duly and regularly for hearing before the Court on the 7th day of July, 1913, upon the demurrer of the defendant to the plaintiffs' complaint, plaintiffs appearing by their attorneys Messrs. Teats, Teats & Teats and the defendant by its attorney, C. H. Winders, and the matter being duly and regularly submitted to the Court by both parties and the Court having taken the cause under advisement and having thereafter filed herein his written opinion sustaining said demurrer, which said opinion was filed on July 10, 1913, and the defendant now moving for an order sustaining said demurrer it is by the Court ordered, adjudged and decreed that the defendant's demurrer to the plaintiffs' complaint be and the same is hereby sustained.

And the plaintiffs in open court, through their attorney, electing to stand upon their complaint with-

out amendment, it is now upon motion of the defendant ordered, adjudged and decreed that the plaintiffs take nothing by their alleged cause of action herein, and that this action be and the same is hereby dismissed, and that the defendant [11] do have and recover of and from the plaintiffs its costs and disbursements herein to be taxed, to all of which the plaintiffs except and an exception is allowed.

Done in open court this 11th day of July, 1913.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Judgment of Dismissal. Filed in the U. S. District Court, Western Dist. of Washington, July 14, 1913, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [12]

[Caption.]

Assignment of Errors.

In the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the above plaintiffs in error by their attorneys Teats, Teats and Teats, and say that in the record and proceedings in the Court below in the above-entitled action therein, there is substantial error in this: First, that the Court erred in sustaining the demurrer of the defendant therein to the complaint of the plaintiffs therein, for the reason that said complaint states a complete cause of action against the defendant therein. Second, that the Court erred in rendering judgment therein in dismissing the plaintiffs' action therein, for the reason

that the said judgment was contrary to law.

TEATS, TEATS & TEATS,
Attorneys for Plaintiffs in Error.

[Acceptance of Service, etc.] [13]

[Caption.]

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, plaintiffs in error, and petitions this Honorable Court to allow a Writ of Error to be directed to the District Court of the United States for the District of Washington, Northern Division, to remove to this, the United States Circuit Court of Appeals for the Ninth Circuit for a review thereof, the record in the case lately pending in said court below, wherein above-named plaintiffs in error were plaintiffs and the above-named defendant in error was defendant, and particularly the record of the judgment rendered by said District Court in the said cause wherein the said Court below sustained the demurrer of the defendant to the complaint of the plaintiffs and dismissed the said plaintiffs said cause at their costs; said judgment was duly entered on record therein on the 11th day of July, 1913; that plaintiffs be allowed to perfect [14] this appeal on filing an appeal bond in the sum of two hundred dollars.

Your petitioners respectfully state that they have this day filed herewith their assignment of errors committed by the Court below in said cause, and intended to be urged by your petitioners and plaintiffs in error in the prosecution of this their suit in error.

Dated July 11, 1913.

TEATS, TEATS & TEATS,
Attorneys for Plaintiffs in Error.

[Acknowledgment of Service, etc.] [15]

[Caption.]

Order Allowing Writ of Error.

Upon a petition of the plaintiffs herein, they having filed their assignments of error, it is ordered that a writ of error be, and is hereby allowed, to have reviewed in the United States Circuit Court of Appeals Ninth Circuit, the judgment heretofore entered herein, upon the plaintiffs in error filing their cost bond in the sum of Two Hundred Dollars.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed: Filed, etc.] [16]

[Caption.]

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS,
That we, Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, and Bennie Meese, a minor, by their Guardian ad litem, Mary A. Meese, as principals, and Fidelity and Deposit Company of Maryland, as Surety,

are held and firmly bound unto the Northern Pacific Railway Company, a corporation, defendant, above named, in the sum of Two Hundred (\$200.00) Dollars, to be paid to the said Northern Pacific Railway Company or its assigns, which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives, assigns, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of July, 1913.

Whereas, the above-named plaintiffs have sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause in the District Court of the United States for the Western [17] District of Washington, Northern Division, and

Now, therefore, the condition of this obligation is such, that if the above-named plaintiffs, Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, shall prosecute said Writ to effect and answer for all costs if it shall fail to make good its plea, then

this obligation shall be void; otherwise to remain in full force and effect.

MARY A. MEESE,
MAY MEESE,
EDITH MEESE and
ANNA MEESE,
ALFRED MEESE, a Minor,
CATHERINE MEESE, a Minor,
LIZZIE MEESE, a Minor,
WILLIE MEESE, a Minor,
BENNIE MEESE, a Minor,

By their Guardian ad Litem,
MARY A. MEESE.

By their Attorneys of Record.
TEATS, TEATS and TEATS,
Principals.

FIDELITY & DEPOSIT COMPANY, of
Maryland.

By H. T. HANSEN,
Attorney in fact.

The above bond and sufficiency of the surety on the same are hereby approved this 16th day of July, 1913.

EDWARD E. CUSHMAN,
Presiding District Judge.

[Endorsed: Filed, etc.] [18]

[Opinion.]

[Caption.]

CUSHMAN, District Judge.

This suit was brought to recover for the death of the husband and father of the plaintiffs, alleged to

have been caused by the wrongful act of the defendant. Defendant demurs to the complaint upon several grounds, the only one argued being,

“That there is no authority in law under which the plaintiffs’ action can be maintained as against this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries of which complaint is made, at the place of work and plant of his employer, and that plaintiffs’ claim comes within the terms of Chapter 74 of the Session Laws of the State of Washington for 1911, being an act relating to compensation of injured workmen.”

The complaint alleges:

“On the 12th day of April, 1913, and for a long time prior thereto, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company, in its plant located at Georgetown in the city limits of the City of Seattle, King County, Washington; and as part of his duty under his employment with the said Brewing Company, was to assist in loading beer upon the cars and also to place Government stamps upon the barrels, half barrels, quarter barrels when filled with beer and before the same were loaded into the railroad cars spotted at the proper place at said Brewing plant for said loading. [19] That at the plant, the said defendant had a railroad track running alongside of the wire house and buildings containing the

finished products to be shipped by said Brewing Company, which said siding was connected with defendant Company's switches, siding and main tracks; and the said defendant Company furnished the said Brewing Company with cars on said track to be loaded with products of said plant to be carried by said defendant Company to their different points of destination. That after the said cars are placed upon said siding of said defendant Company, the cars were spotted and moved by the Brewing Company to different places necessary for the loading on said siding, with appliances furnished and operated by the said Brewing Company; and when the said cars were so placed upon the said siding and spotted at the proper places for loading the cars, said Brewing Company used skids and other appliances extending from the car into the wire house of the Brewing Company, for the purpose of rolling the kegs, barrels, quarter barrels or half barrels of the finished product of the Brewing Company from the plant into the car; and the said Brewing Company employed a crew of men called loaders for the purpose of loading said car with their said finished product and also with ice sometimes necessary in the shipment of the said finished product and at the same time of loading the said car, the said Brewing Company employed workmen to place the necessary Government stamps upon each of the receptacles of the said finished product, which was usually done while said receptacles were

moving along the said skids; and the workmen who performed said work usually stood upon the floor or platform beneath the skids and which platform ran alongside of the building and plant of the Brewing Company and into the opening in the building or plant where the finished product was taken from the storehouse or plant. That while loading and filling the said car, the movement of the said car, especially without notice to the loading crew and the employee who placed the Government stamps upon the receptacles, was dangerous to the workmen of the Brewing Company, as the movement of the said car would cause the skids and receptacles of the finished product to fall upon the employees of the Brewing plant and injure them.

“That at the time of the accident herein complained of, the deceased husband and father, was placing Government stamps upon the receptacles, half barrels of the finished products of the Brewing Company, in his regular course of employment, with the Brewing Company and located to the south of the skids and half barrels as they moved from the plant of the Brewing Company into the car.

“That while the said deceased, Benjamin Meese, was so employed, placing Government stamps upon the half barrels and filling and loading a car upon said siding, on the 12th day of April, 1913, at about the hour of 6:10 o'clock of the evening of said day, the said defendant

Company by and through its switch-man, locomotive engineer and employees, carelessly and negligently without warning to the deceased, Benjamin Meese, and without warning to any of the loading crew, then in the employ of the said Brewing Company, loading the car upon the said siding, knowing that said men were at that time loading the car, caused a number of cars to come down the said siding alongside of the plant of the said Brewing Company with tremendous force and momentum, striking the car then being loaded, with tremendous force and momentum, knocking the car along the track, causing the skid then being used by loading crew to load the said car to fly backwards and against the deceased, causing large number of half barrels loaded with the finished product of the Brewing Company upon the said skids to fall upon the deceased maiming and injuring him so that from said injuries so received through the carelessness and negligence of the defendant Company, the said Benjamin Meese, [20] deceased, died on the morning of the 17th day of April, 1913, leaving his widow and children, parties plaintiff herein."

TEATS, TEATS & TEATS, for Plaintiffs.

C. H. WINDERS, for Defendant.

The Workmen's Compensation Law (Washington Session Laws 1911, p. 345), provides:

"* * * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises

are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided. (Sec. 1, pp. 345 and 346.) * * *

“Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer: ‘PROVIDED, HOWEVER, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of

the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department. (Sec. 3, pp. 347 and 348.) * * *

“Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.” (Sec. 5, p. 356.)

No question is made but that the employment of the deceased was of an extrahazardous character and within those employments provided for in the act. The question presented [21] is purely one of statutory construction.

Upon the argument much was said concerning the constitutionality of a legislative act compelling contribution from one person, or employer, to be used in

paying for the negligence of another. This phase of the act is not now before the Court. That is a defense only to be made by those obliged to contribute to, or those charged with the duty of administering the funds contributed. The question of legislative power may, in this case, only be considered as, possibly, one of the guides to be resorted to in determining the legislative intent manifested by the law as written.

There is no right of action at common law to recover for death occasioned by the wrongful act of another.

13 Cyc. 310.

It is a right solely given by statute. A right such as this which the legislature gives, it may, of course, take away. The sole question, therefore, is: What was the legislative intent concerning this matter? Was it to end all suits at law for the injury or death of employees while engaged in certain occupations, no matter by whom injured or killed? Or, was it only to end such controversies between employer and employee?

Parts of the act, taken alone, would justify either conclusion. The title provides:

“An Act relating to the compensation of injured workmen in our industries.”

This shows a broad purpose—broad enough to include all injuries caused by any one to such “workman in our industries.”

Section 1 announces:

“The common law system governing the remedy of workmen against employers for injuries

received in hazardous work is inconsistent with modern industrial conditions.”

This shows a narrower view; but, as shown by the parts of the act quoted above, it does not stand alone. Section III of the act, above quoted, provides that, when the deceased workman is [22] killed “away from the plant of his employer,” through the negligence of another “not in the same employ,” his wife or children may elect whether to take, under the act, the industrial insurance therein provided for, or seek to recover from such other—that is, recover in an ordinary law action for such other’s negligence.

In this case, the complaint shows that the deceased was—giving the ordinary meaning to the words—killed, not “away from,” but at the plant of his employer. Sections III and V, in classifying the injuries by the place where they occur, both contain the expression, “whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer.” “At the plant” may include less or more than “on the premises,” depending on the relative extent of the two; but these two expressions show an intention not to limit the application of the law to real property boundaries.

The proviso, expressly preserving the right of action at law for the death of an employee, resulting from an injury “occurring away from the plant of the employer” clearly shows an intent to except from that provision of the act, abolishing all private controversies and all rights of civil action, what, but for such provision, would have been abolished, and,

as the right of civil action is alone preserved when the injury occurs "away from the plant of the employer," then it is not preserved, but is abolished when it occurs at the plant of the employer.

This intent is further manifested by Section V of the act providing for the payment of industrial insurance from the fund created by the act, which "shall be in lieu of any and all rights of action whatsoever against any person whomsoever," "Except as in this act otherwise provided."

The only relevant exception is, without doubt, the one referred to in the provision of the act providing:

"That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another [23] not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case."

(p. 348.)

Courts have often had occasion to point out that the intent may frequently more satisfactorily be

shown by the nature of an exception than in any other way. This seems to be such a case.

Demurrer sustained.

Filed July 10, 1913. [24]

Writ of Error [Copy].

UNITED STATES OF AMERICA.

The President of the United States of America to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of dismissal which is in the said District Court before you, or some of you between Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, plaintiffs in error, and Northern Pacific Railway Company, a corporation, defendant in error, a manifest error hath happened to the damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have

the same at San Francisco, in said Circuit, on the 13th day of August, 1913; and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 14th day of July, 1913.

[Seal] FRANK L. CROSBY,
Clerk of the District Court of the United States
District Court, for the Western District of
Washington. [25]

Allowed by

[Seal] EDWARD E. CUSHMAN,
District Judge of the United States, Presiding in
the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.

[Admission of Service, etc.]

Filed July 16, 1913. [26]

[Caption.]

Citation [Copy].

UNITED STATES OF AMERICA.

The President of the United States of America to
Northern Pacific Railway Company, a Corpora-
tion, Greeting:

You are cited and admonished to be and appear
in the United States Circuit Court of Appeals for the
Ninth Circuit at the courtroom of said Court, in the
city of San Francisco, in the State of California,

within thirty (30) days after the date of this Citation, pursuant to Writ of Error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf. [27]

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 14th day of July, 1913.

[Seal]

EDWARD E. CUSHMAN,

Judge of the District Court of the United States.

[Admission of Service, etc.]

Filed July 14, 1913. [28]

[Caption.]

Praeipie.

To the Clerk:

Please make and prepare the record for the Circuit Court of Appeals in the above-entitled action, to wit: Complaint, Demurrer, Order Sustaining Demurrer and Judgment Dismissing Case, Assignment of Error, Petition for Writ of Error, Order Allowing Writ of Error, Appeal Bond, Opinion of Court.

TEATS, TEATS and TEATS.

[Endorsedment of filing, etc.] [29]

[Caption.]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 29 typewritten pages numbered from 1 to 29, inclusive, to be a true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the foregoing to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fee (Sec. 828 R. S. U. S. as Amended by Sec. 6 Act of March 2, 1905) for making transcript of the record for printing purposes, 84 folios at 20c per folio.....	\$16.80
Certificate to certified copy of type- written transcript of record.....	.30
Seal to said certificate.....	.40
	<hr/>
	\$17.50

I hereby certify that the above cost for preparing and certifying record amounting to \$17.50 has been paid to me by Messrs. Teats, Teats & Teats, attorneys for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 17th day of July, 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

Writ of Error [Original].

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of dismissal which is in the said District Court before you, or some of you

between Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their guardian ad litem, Mary A. Meese, Plaintiffs in Error, and Northern Pacific Railway Company, a corporation, Defendant in Error, a manifest error hath happened to the damage of the said Plaintiffs in Error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in said Circuit, on the 13th day of August, 1913; and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court

of the United States, this 14th day of July, 1913.

[Seal]

FRANK L. CROSBY,

Clerk of the District Court of the United States District Court, for the Western District of Washington.

Allowed by

[Seal]

EDWARD E. CUSHMAN,

District Judge of the United States, Presiding in the District Court of the United States, for the Western District of Washington, Northern Division.

[Admission of Service, etc.]

[Caption.]

Citation [Original].

UNITED STATES OF AMERICA.

The President of the United States of America to Northern Pacific Railway Company, a Corporation, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty (30) days after the date of this Citation, pursuant to Writ of Error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a minor, Catherine Meese, a minor, Lizzie Meese, a minor, Willie Meese, a minor, Bennie Meese, a minor, by their

guardian ad litem, Mary A. Meese, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 14th day of July, 1913.

[Seal] EDWARD E. CUSHMAN,
Judge of the District Court of the United States.

[Admission of Service, etc.]

[Stipulation Under Rule 23 as to Printing Record.]

[Title of Cause.]

In printing the record the Clerk shall eliminate all captions and verifications, excepting the caption of the complaint, and in lieu thereof print the words: "Caption" and "Verification"; also all file marks, admissions and proof of service.

TEATS, TEATS & TEATS,
Attorneys for Plaintiff in Error.

C. H. WINDERS,
Attorney for Defendant in Error.

[Endorsed]: No. 2287. In the United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 21, 1913. F. D. Monckton, Clerk.

[Endorsed]: No. 2287. United States Circuit Court of Appeals for the Ninth Circuit. Mary A. Meese, May Meese, Edith Meese, Anna Meese, Alfred Meese, a Minor, Catherine Meese, a Minor, Lizzie Meese, a Minor, Willie Meese, a Minor, Bennie Meese, a Minor, by Their Guardian ad Litem, Mary A. Meese, Plaintiffs in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 21, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY A. MEESE, MAY MEESE, EDITH
MEESE, ANNA MEESE, ALFRED
MEESE, a minor; CATHERINE MEESE,
a minor; LIZZIE MEESE, a minor;
WILLIE MEESE, a minor; BENNIE
MEESE, a minor, by their guardian
ad litem, MARY A. MEESE,

Plaintiffs in Error,

VS.

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT OF THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

Brief of Plaintiffs in Error

STATEMENT.

On the 12th day of April, 1913, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company of Seattle, Washington, plac-

ing Government stamps on filled kegs as they were being loaded into cars of the defendant in error, the Northern Pacific Railway, which were spotted alongside of the brewery's storehouse on defendant's siding. The siding was part of defendant's railway system. The storehouse was part of the brewing plant of the deceased employe.

While at work on said date in his regular course of employment, placing stamps on the kegs as they were being loaded by the loading crew of the Brewery, the defendant's switch crew, knowing the deceased and the loading crew were at work in and about the car, without warning to them or the deceased, shunted some cars down the siding with great speed, striking the car being loaded with terrific force, throwing the kegs with great force against and upon the deceased, causing injuries from which he died five days later.

“That immediately after the accident and injury to Benjamin Meese, deceased, plaintiffs herein employed a surgeon and doctor for the purpose of treating and caring for the deceased, and that the said doctor and surgeon attended the deceased during the several days he lived, performed operations, and that the services so rendered are of the reasonable value of two hundred and fifty (\$250.00 dollars. That the plaintiffs herein removed the deceased during his illness to the hospital and incurred a liability there of forty and 53/100

dollars. That the burial of the deceased caused the plaintiffs herein the sum of about four hundred and twenty-five (\$425.00) dollars" (Rec., Sec. 5, p. 6).

The deceased left surviving him his widow and children, plaintiffs in error herein, who commenced this action against the railway company to recover expense incurred for the surgeon and doctor in the case of the deceased from the time of his injury until his death in the sum of \$250.00, hospital services \$40.53, burial expense \$425.00 and also general damages, \$25,000.00, in the total sum of \$25,715.53.

The Railway Company demurred to the complaint on the ground that the Workmen's Compensation law of the State of Washington, (Ch. 74, laws 1911), has withdrawn all rights of action by reason of the matters set forth in the plaintiff's complaint from legal controversy and from the jurisdiction of the court.

The demurrer was sustained on that ground. Plaintiffs standing upon their complaint, judgment of dismissal was entered against the plaintiffs and they have sued out this writ of error.

ARGUMENT.

The writer of this brief wishes to state in the first place that we do not attack the constitutionality of the law as a whole, nor do we attack the decision of the Supreme Court of the State of Wash-

ington in upholding the law in the case of *State ex rel. Davis vs. Clausen*, 65 Wash. 156, but our position in this matter is,

First: The Workmen's Compensation Act of Washington does not and never was intended to abrogate the rights of workmen in our industries against third party wrong-doers. But that Act undertakes great reforms bearing on the relation of master and servant and does not undertake to eliminate the workmen's cause of action arising through negligence against third parties.

Second: That if the language of the Act is so comprehensive as to sustain the position of the lower court, that portion of the Act comes within the inhibition of the 14th Amendment to the Constitution and Section 12 of Article 1 of our State Constitution, giving plaintiffs equal protection of law.

Third: The liability of the defendant in error to the plaintiffs in error for surgeon's and doctor's bills, hospital services and funeral expenses, is a vested right under the common law, which the Legislature cannot take away, in such a case as the case at bar. The lower court rests its decision upon the construction of the Statute and says that it can be construed either for or against the plaintiffs. Let us take up the simple question of the construction of the Statute and, in order to do so, we must understand the conditions which brought forth the law.

For several years before the enactment of the Workmen's Compensation law, there was a great awakening of the public mind to the realization of the enormity of industrial accidents and the great injustice done to the injured and the wives and children of those killed while at work in the industries of the country. The court made law or rule of fellow servant, assumption of the risk and contributory negligence, placed the burden of 90 per cent of those accidents upon the injured or their survivors, which was also a burden on the people. Personal injury litigation and perhaps the conduct of many lawyers gave employers the nightmare, and they sought relief through casualty insurance companies which sold them a policy indemnifying them against loss. For a while that seemed a protection, but the merciless, heartless adjusters of casualty companies played upon the poverty of the injured workmen, took advantage of every condition and drove hard bargains in their settlement. This resulted in ill feelings between all the workmen and their employers. Their community interests were fast being divorced through these conditions. When an accident occurred, the employer was compelled to turn over to the casualty company his duty of adjustment, and this simple fact has caused the whole working force of the employer to quit their work and walk away, to the great loss of the employer as well as the employee. In cases where the injured workman received a judgment the employer was liable for the excess

over his policy and the casualty company was ever ready to contest its liability on the slimmest technicality. So universal was this that at the time of the passage of the Workmen's Compensation law employers of this State carrying a casualty policy had no assurance of safety. The workmen who must fight the casualty company and run the gauntlet of the technical points of law had no assurance of winning. There became a demand, almost universal, that this unscientific, strife-breeding condition between employer and employe should cease. All over the land students of economics, employes and employers, gathered together to discuss conditions of master and servant, reforms and the ways and means of reform. They recognized that accidents in our industries are inevitable; that each individual of the human race is subject to the fault of forgetfulness, and that the burden and loss to an individual workman through an accident is as much an expense and a charge upon the industry as the breaking of a machine or the killing of a mule. The industry must bear the burden which naturally belongs to it. This sentiment crystallized rapidly and found its expression in the compensation laws of the different states. During the last three years 23 states have passed workmen's compensation or accident insurance laws. The future promises more and better laws along these lines and also along the line of laws preventing accidents. Judge Fullerton recognized these facts when he said:

“That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accident in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependants, or by the state at large. IT WAS THE BELIEF OF THE LEGISLATURE THAT THEY SHOULD BE BORNE BY THE INDUSTRIES CAUSING THEM, or perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded.”

In July of 1910, a number of employers, workmen and students of sociologic and economic subjects gathered in Tacoma, discussed conditions and ways and means for relief. We invited the Governor of the State of Washington to preside to give it an official color. We had him appoint a commit-

tee of five employers and five employes for the purpose of investigating and drawing up some sort of a measure along the lines of the German Workmen's Compensation law. The writer of this brief constantly attended the meetings as a sort of *amicus curiae*. He went to the Legislature of 1911 for the major purpose of passing a compensation law along the lines agreed upon by the Commission.

The Commission termed itself the Employers Liability Commission to solve the question of industrial insurance, in no other phase except that relating to master and servant. The constitutional questions involved in that phase alone were sufficient to keep us all within those limits (See report of Commission). The first section of the Act is a declaration of the principles, statement of the purpose and scope of the Act:

“THE COMMON LAW SYSTEM GOVERNING THE REMEDY OF WORKMEN AGAINST EMPLOYERS FOR INJURIES RECEIVED IN HAZARDOUS WORK IS INCONSISTENT WITH MODERN INDUSTRIAL CONDITIONS. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the

State depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that ALL PHASES OF THE PREMISES are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this Act; and to that end all civil actions and civil causes of action *for such personal injuries* and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this Act provided.

“The abolishing of jurisdiction of courts over personal injury claims applies only to those in the relation of employer and employe in “extra hazardous” occupations. Employes as members of the public have their rights against third persons as heretofore. Suits allowed against employer, see Sec. 8. Even though the injury or death be caused by the tort of a third person, the employe may obtain compensation by election and assignment, except where a wilful act of such other, committed against the employe, be for reasons personal and not because of his employment.”
Note of Commission at end of Sec. 1.

"All phases of the premises" has a legal meaning. It relates to the subject which has been mentioned, the remedy of the workman against his employer for injury received in hazardous work. It was the condition I have described existing between master and servant the law undertook to remedy—with one exception, perhaps, as is mentioned in Section 3, which provides,

"That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the State for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the State may be prosecuted, or compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department."

With this exception the law does not pretend to change the rights of the workman or his heirs or representatives as against a third person. This section did not take away his right of action against the third person. It only gave him the privilege of accepting compensation from the State upon his assigning his right of action against the third person.

It seems to me that it is a farfetched construction of this clause to say that the Statute meant to take away all right of action against third persons simply because the workman was injured or killed while at the plant and in the course of duty. Why give to the employee who was injured away from the plant the option of pursuing the third person and take away from the employee who remains at the plant his right of action against the third party who injures him at the plant? To me it seems that this is so objectionable, having regard to the rights of the workman, that even if the Act specially provided for such, it would be objectionable on constitutional ground, and where the Act does not specially provide for an elimination of the workman's right of action who was injured at the plant by a third person, what would we say of a court that will interpolate by way of construction such a provision?

EQUAL PROTECTION OF THE LAWS:

This subject has been so thoroughly thrashed out in the Supreme Court of the United States that

possibly all that is necessary is a few citations. But our position is, as stated before, that the plaintiffs in this case by the rule of the court below are not given their protection, their rights, as guaranteed by the 14th Amendment. Equal protection, as we understand it, means equality to all similarly situated. That is, not discriminating against some and favoring others and which affects alike all persons similarly situated. *Barbier vs. Connolly*, 5 Supr. Ct. Rep. 357. That is to say, if the law applies to all persons who are injured under like or similar circumstances to the injury which occurred to the deceased husband and father, then the law is not within the inhibition of the constitutional provision. But if the law does not treat all persons alike, then it is within the inhibition. *Mo. Pac. vs. Mackey*, 8 Supr. Ct. Rep. 1161. But if the law treats or applies to a class which is distinct within itself and has characteristics belonging to itself, such as the setting out of fires by locomotives, injuries which occur in mines or certain extra hazardous industries can be treated specially by a law, either imposing other duties, or taking away different defenses, or changing the whole system of liability and compensation as is done in the Workmen's Compensation Act. But where the business of employers is not subject to peculiar dangers to the employes, dangers not characteristic to that particular industry, it is an unreasonable classification and not permitted. This is well put by the Supreme Court of Kansas:

“The equal protection mentioned by enforcement of this Statute is denied by making one of two men engaged in the same business under precisely similar circumstances in the same town or building, a criminal, and imposing no penalty whatever upon the other for the same act. The only difference being that one works for a co-partnership and the other for a corporation.” *State vs. Haun*, 47 L. R. A. 369.

Construing an act to secure to laborers and others the payment of their wages, applied only to corporations and trusts employing ten or more persons.

The construction held by the lower court means simply that the plaintiffs in error herein cannot pursue the wrong-doer simply because by chance the deceased husband and father at the time of the accident was working in an extra-hazardous vocation. Had he not been at work, but had stepped beyond the car or stood there talking with someone with whom and where he had a right, and not being in the employ of some extra-hazardous industry, there would be no question as to plaintiffs' right of action. Then suppose again that Mr. Meese had been at work for a grocer who is not within the Act and was employed in taking out of the car barrels of syrup instead of barrels of beer and was injured through similar negligence, of

course there would be no contention about his wife and children having a right to sue; and so you can go on with many cases of similar conditions, eliminating the point of employment, and they all would have their right of action. There is no particular class who work at loading and unloading cars and there is no law that attempts to classify such work, except as it is construed into the Act.

If the plaintiffs would have had a right to pursue the Northern Pacific for their wrongful act had Mr. Meese not been at work, then does not the law or the construction of the law deny the plaintiffs their equal protection? If, at the time of the accident and injury to Mr. Meese, his neighbor, Mr. Jones, had been at the same place, he being there rightfully, but not employed, and injured through the same negligence of defendant, the rule of the lower court would permit Mr. Jones to pursue his right of recovery against the railway company and deny Mr. Meese his right. Can a plainer case of the invasion of constitutional rights be made out? This question is thoroughly gone into in the case of *Cotting vs. Goddard*, 22 Supr. Crt. Rep. 30, construing a Statute of Kansas where an attempt was made to impose certain limits on charges of certain corporations. So, in this case, the decision below places a limit upon the rights of the plaintiffs under certain conditions which are not placed upon others under similar conditions. The fact of the

employment is only an incident, it is not a condition, for Meese, as well as many others, could have been in similar conditions loading cars for himself, assisting a neighbor, or passing the car on a public crossing, and under those conditions injured or killed, which would have fixed a liability beyond question. See also *Gulf Ry. vs. Ellis*, 17 Supr. Crt. Rep. 255. In that case the Supreme Court held invalid the Texas Statute, that railroad companies, failing to pay claims less than \$50.00 for labor, etc., within 30 days shall be liable for an attorney's fee. As said in that case:

“The State may not say that all white men shall be subject to the payment of the attorney's fees of those successful suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which are not furnished proper basis for classification. We must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed and can never be made arbitrarily.”

So in this case the State cannot say that the man, because he is in the employ of an industry, shall be denied his right of action against the third person, but if he is injured while not in his employ, can have his right of action. It cannot say that

because he was in the employ of a certain concern he cannot have the right of action for a wrong done him by a third party, while if he had been in the employ of some other concern and injured under similar circumstances, he would have a right of action. These are distinctions which do not furnish any proper basis for the attempted classification as interpolated by the lower court into the Workmen's Compensation Act. This classification is arbitrary. This is not a classification in fact, because there is no class to which the rule applies. The lower court seem to lay a great deal of stress upon the proposition that liability for wrongful death is a matter of Statute and that the Compensation Act took away that liability, but that is only true when applied to the employer. Even though there was no liability for the death under common law, there was a liability for the doctor bill, hospital fees and burial services when the death is not instantaneous.

Dean vs. Ry., 44 Wash. 564.

Philby vs. Ry., 46 Wash. 173.

It seems to us that the railroad company, defendant in error, cannot be relieved of the liabilities under the law as existing at the time of the passage of the Compensation Act, without some positive declaration in the law, and it is our contention that, even with a declaration eliminating all liability for wrongful acts, including that of third persons,

would be unconstitutional under the circumstances and conditions of this case. We respectfully submit that the lower court should be reversed and the plaintiffs given their right to proceed.

Respectfully submitted,

GOVNOR TEATS,

LEO TEATS,

RALPH TEATS,

Attorneys for Plaintiffs in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY A. MEESE, MAY MEESE,
EDITH MEESE, ANNA MEESE,
ALFRED MEESE, a minor; CATH-
ERINE MEESE, a minor; LIZZIE
MEESE, a minor; WILLIE
MEESE, a minor; BENNIE
MEESE, a minor, by their guardian
ad litem, MARY A. MEESE,

Plaintiffs in Error,

vs.

NORTHERN PACIFIC RAILWAY
COMPANY, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

STATEMENT.

Jurisdiction was acquired in this case on the ground of diverse citizenship, the action being brought by the widow and surviving children of

Benjamin Meese, to recover \$25,715 damages as the result of his alleged wrongful death while working at the plant of the Seattle Brewing & Malting Company, within the city of Seattle; and the cause of action, if any is stated, must be based upon the statute laws of the State of Washington.

The complaint alleges that the plaintiffs' decedent was killed while engaged in his employment at his place of work, for the Seattle Brewing & Malting Company, as a result of the switching, by the Northern Pacific Railway Company, of cars upon a track used in connection with the business transacted by that company, the complaint showing that both the representatives of the Railway Company doing such switching, and the deceased himself were working towards the accomplishment of the business ends or necessities of the Brewing Company; that the switching crew in performing its work at and for the brewery, failed to notify the deceased that it would disturb a car connected with one of the brewery buildings by a loading chute, and as a result thereof, when the car was disturbed, the loading chute which extended into the building, came in contact with a pile of beer barrels, causing them to be thrown down and upon the plaintiff, inflicting injuries which caused his death.

Under the foregoing statement of facts a de-

murrer was filed upon the ground among others that all jurisdiction of the courts by reason of an accident such as that referred to in the complaint had been withdrawn, and certain relief accorded to the plaintiffs under what is known as the Workman's Compensation Act of the State of Washington, found in *Chapter 74 of the Session Laws of the State of Washington for 1911*, being an act relating to the compensation of injured workmen.

This demurrer presented for the consideration of the district court purely a question of statutory construction, which up to that time had not been passed upon by any appellate court, although a construction such as that contended for by the defendant in error had been sustained by the Superior Court of the State of Washington, for King County, and the question was then and is now pending in the Supreme Court of the State of Washington.

The gist of the complaint and the statutory provisions governing the rights given to injured workmen, under the compensation act, are so concisely set forth in the opinion of Judge Cushman, that we believe that the issues will be more clearly set forth, and the statutory provisions relating thereto more clearly brought out by quoting Judge Cushman's opinion:

“CUSHMAN, District Judge.

“This suit was brought to recover for the death of the husband and father of the plaintiffs, alleged to have been caused by the wrongful act of the defendant. Defendant demurs to the complaint upon several grounds, the only one argued being,

“ ‘That there is no authority in law under which the plaintiffs’ action can be maintained as against this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries of which complaint is made, at the place of work and plant of his employer, and that plaintiffs’ claim comes within the terms of Chapter 74 of the Session Laws of the State of Washington for 1911, being an act relating to compensation of injured workmen.’

“The complaint alleges:

“ ‘On the 12th day of April, 1913, and for a long time prior thereto, Benjamin Meese, deceased, was in the employ of the Seattle Brewing & Malting Company, in its plant located at Georgetown in the city limits of the City of Seattle, King County, Washington; and as part of his duty under his employment with the said Brewing Company, was to assist in loading beer upon the cars and also to place Government stamps upon the barrels, half barrels, quarter barrels when filled with beer and before the same were loaded into the railroad cars spotted at the proper place at said brewing plant for said loading. That at the plant, the said defendant had a railroad track running alongside

of the wire house and buildings containing the finished products to be shipped by said Brewing Company, which said siding was connected with defendant company's switches, siding and main tracks; and the said defendant company furnished the said Brewing Company with cars on said track to be loaded with products of said plant to be carried by said defendant company to their different points of destination. That after the said cars are placed upon said siding of said defendant company, the cars were spotted and moved by the Brewing Company to different places necessary for the loading on said siding, with appliances furnished and operated by the said Brewing Company; and when the said cars were so placed upon the said siding and spotted at the proper places for loading the cars, said Brewing Company used skids and other appliances extending from the car into the warehouse of the Brewing Company, for the purpose of rolling the kegs, barrels, quarter barrels or half barrels of the finished product of the Brewing Company from the plant into the car; and the said Brewing Company employed a crew of men called loaders for the purpose of loading said car with their said finished product and also with ice sometimes necessary in the shipment of the said finished product and at the same time of loading the said car, the said Brewing Company employed workmen to place the necessary Government stamps upon each of the receptacles of the said finished product, which was usually done while said receptacles were moving along the said skids; and the workmen who performed said work usually stood upon the floor or platform beneath the skids and which platform ran alongside of the building and plant of the Brewing Company and into the opening in the building

or plant where the finished product was taken from the store house or plant. That while loading and filling the said car, the movement of the said car, especially without notice to the loading crew and the employe who placed the Government stamps upon the receptacles, was dangerous to the workmen of the Brewing Company, as the movement of the said car would cause the skids, and receptacles of the finished product to fall upon the employes of the brewing plant and injure them.

“ ‘That at the time of the accident herein complained of, the deceased husband and father was placing Government stamps upon the receptacles, half barrels of the finished products of the Brewing Company, in his regular course of employment, with the Brewing Company and located to the south of the skids and half barrels as they moved from the plant of the Brewing Company into the car.

“ ‘That while the said deceased, Benjamin Meese, was so employed, placing the Government stamps upon the half barrels and filling and loading a car upon said siding, on the 12th day of April, 1913, at about the hour of 6:10 o'clock of the evening of said day, the said defendant company by and through its switchman, locomotive engineer and employes, carelessly and negligently without warning to the deceased, Benjamin Meese, and without warning to any of the loading crew, then in the employ of the said Brewing Company, loading the car upon the said siding, knowing that said men were at that time loading the car, caused a number of cars to come down the said siding alongside of the plant of the said Brewing Company with tremendous force and momentum, striking the car then being loaded, with tre-

mendous force and momentum, knocking the car along the track, causing the skid then being used by loading crew to load the said car to fly backwards and against the deceased, causing large number of half barrels loaded with the finished product of the Brewing Company upon the said skids to fall upon the deceased, maiming and injuring him so that from said injuries so received through the carelessness and negligence of the defendant company, the said Benjamin Meese, deceased, died on the morning of the 17th day of April, 1913, leaving his widow and children, parties plaintiff herein."

"The Workmen's Compensation Law (Washington Session Laws 1911, p. 345), provides:

"* * * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided. (Sec. 1, pp. 345 and 346.)

* * *

" "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of

manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: *Provided, However,* That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependants, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department. (Sec. 3, pp. 347 and 348.) * * *

“ ‘Each workman who shall be injured, whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.’ ” (Sec. 5, p. 356.)

“No question is made but that the employment of the deceased was of an extra hazardous character and within those employments provided for in the act. The question presented is purely one of statutory construction.

“Upon the argument much was said concerning the constitutionality of a legislative act compelling contribution from one person, or employer, to be used in paying for the negligence of another. This phase of the act is not now before the court. That is a defense only to be made by those obliged to contribute to, or those charged with the duty of administering the funds contributed. The question of legislative power may, in this case, only be considered as, possibly, one of the guides to be resorted to in determining the legislative intent manifested by the law as written.

“There is no right of action at common law to recover for death occasioned by the wrongful act of another.

13 *Cyc.* 310.

It is a right solely given by statute. A right such as this which the legislature gives, it may, of course, take away. The sole question, therefore, is: What was the legislative intent concerning this matter?

Was it to end all suits at law for the injury or death of employees while engaged in certain occupations, no matter by whom injured or killed? Or, was it only to end such controversies between employer and employee?

“Parts of the act, taken alone, would justify either conclusion. The title provides:

“‘An Act relating to the compensation of injured workmen in our industries.’

This shows a broad purpose—broad enough to include all injuries caused by any one to such “workman in our industries.” Section 1 announces:

“‘The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions.’

“This shows a narrower view; but, as shown by the parts of the act quoted above, it does not stand alone. Section III of the act, above quoted, provides that, when the deceased workman is killed ‘away from the plant of his employer,’ through the negligence of another ‘not in the same employ,’ his wife or children may elect whether to take, under the act, the industrial insurance therein provided for, or seek to recover from such other—that is, recover in an ordinary law action for such other’s negligence.

“In this case, the complaint shows that the deceased was—giving the ordinary meaning to the words—killed, not ‘away from,’ but at the plant of his employer. Sections III and V, in classifying the injuries by the place where they occur, both contain the expression, ‘whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer.’ ‘At the plant’ may include less or more than ‘on the premises,’ depending on the relative extent of the two; but these two expressions show an intention not to limit the application of the law to real property boundaries.

“The proviso, expressly preserving the right of action at law for the death of an employee, resulting from an injury ‘occurring away from the plant of the employer’ clearly shows an intent to except from that provision of the act, abolishing all private controversies and all rights of civil action, what, but for such provision, would have been abolished, and, as the right of civil action is alone preserved when the injury occurs ‘away from the plant of the employer,’ then it is not preserved, but is abolished when it occurs at the plant of the employer.

“This intent is further manifested by Section

V of the act providing for the payment of industrial insurance from the fund created by the act, which 'shall be in lieu of any and all rights of action whatsoever against any person whomsoever,' 'except as in this act otherwise provided.'

"The only relevant exception is, without doubt, the one referred to in the provision of the act providing

" 'That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case.' (p. 348.)

"Courts have often had occasion to point out that the intent may frequently more satisfactorily be shown by the nature of an exception than in any other way. This seems to be such a case.

"Demurrer sustained."

ARGUMENT.

In the brief filed by the plaintiffs in error it is urged that the opinion of Judge Cushman is unsound for the reason, *first*, that the workman's compensation act itself does not abrogate the rights of workmen as against third parties; and, *second*, that if it does, such act comes within the inhibition of the fourteenth amendment of the constitution of the United States.

While there is some suggestion to the contrary in the brief of the plaintiffs in error, it cannot be seriously contended but that the only right of action for the wrongful death of another must be based upon statute law, there being no such right of action given at common law.

Michigan C. R. Co. vs. Vreeland, 227 U. S. 59; 33 Sup. Ct. Rep. 192;

St. Louis, San Francisco & Texas Ry. Co. vs. Seale, decided May 26th, 1913, *Advance Sheets of the Supreme Court Reporter*, July 1st, 1913; 33 Sup. Ct. Rep. 651.

13 *Cyc.* 310.

The question then resolves itself into one of statutory construction, and without considering the theory of the learned attorney for the plaintiffs in error, or the recital of some of the abuses which might have been in the minds of some of the leg-

islators of the State of Washington at the time of the passage of this act, many of which are pointed out by the Supreme Court of Washington in the case of *State ex rel Davis vs. Clausen*, 65 Wash. 156; 117 Pac. 1101, a reading of the act will show that its purpose was to afford *sure and certain relief to workmen, in case of injury, or their dependents, in case of death*, regardless of the question of fault or parties responsible and to the exclusion of every other remedy, the first section of the act containing the following declaration:

“The State of Washington * * * declares that *all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen injured in extra hazardous work and their families and dependents* is hereby provided regardless of questions of fault and to the *exclusion of every other remedy, proceeding or compensation* except as otherwise provided in this act, and to that end *all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished except as in this act provided.*”

Further by Section 5 of the same act, the Legislature provided as follows:

“*Each workman who shall be injured, whether upon the premises or at the place, or he being in the course of his employment away from the plant of his employer; or his family or dependents, in case of death of the workman*

shall receive out of the accident fund compensation in accordance with the following schedule, and except as in this act otherwise provided, which payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever."

It cannot be questioned but that the purpose of the legislature was to accomplish that which is by the plain words of the act set forth, and that is to provide certain relief to every employe engaged in hazardous employment, irrespective of the cause of the injury, and irrespective of the place of injury. The only test is was he engaged in the course of his employment, and was that employment a hazardous employment as defined by the act. No question is made in this case that the employment of the plaintiffs' decedent was not a hazardous employment within the terms of the act, such employment being designated as Class 37 in Section 4 of the act.

It will be noted that both *Section 1* and *Section 5* provide that the relief afforded by the act shall be exclusive and that *all rights of action against whomsoever* is taken away, except as saved by the act, and the only saving clause found in the act is in the latter part of *Section 2*, under which an employe is given a right of action against a third person for injuries sustained by reason of his or its

negligence *away from the plant or place of work* of his employer.

It is not argued by the plaintiffs in error that the plaintiffs are not entitled under this act to take the compensation as therein provided. The act itself provides that the workman or his dependents are entitled to take compensation regardless of the question of fault, and that such compensation shall be in lieu of any and all right of action whatsoever against any person whomsoever. Having the right to take compensation, there is only one exception under which they are accorded an alternative remedy, and that is in case the injury takes place away from the plant or place of work of the employer. No question is raised in this case, but that the accident occurred at the plant and place of work of the plaintiffs' decedent, and it would seem that a construction of this act as contended for by plaintiffs in error must be based upon the theory that they are not covered thereby, which under the facts in this case would deprive the plaintiffs in error of its benefits and would run contrary to the plain intent of the legislature, to afford certain and definite relief in all cases of injury within the industries of our state.

It is true that in this particular case it may be

a larger return would be brought in by the jury, and that defendant in error being financially responsible would be required to respond. However, there are always certain defenses. The question of negligence would be one for the jury, as well as the deceased's contributory negligence; and on the other hand, the same character of an accident could be brought about by an irresponsible teamster or drayman, and under the act there can certainly be no contention that for an injury occurring *at the plant* of an employer *his personal representatives may elect* to take under the act or sue some third party. the act is plain that the only circumstances under which such right is reserved is when the injury takes place away from the employer's place of business. We therefore submit that under the plain terms of the act, it was the intention of the legislature to cover a case of this character in which, while the employe was injured as the result of the negligence of the third party, both said third party and himself were engaged in the operation of the employer's business and at his plant and place of work.

II.

Both the Supreme Court of the State of Washington, and the District Court for the Western District of Washington, have held that the act in ques-

tion does not violate either the state or federal constitution.

State ex rel Davis vs. Clausen, 65 Wash. 156; 117 Pac. 1101.

Stoll vs. Pacific Coast S. S. Co., 205 Federal 169.

As shown by the preamble of the act, by its passage the state merely exercised its police power, and if it is found that the act has a reasonable relation to the protection of the public welfare of the state, it will not be set aside as violating the fourteenth amendment of the constitution of the United States, although it may incidentally deprive some person of his property without fault, or require one person indirectly to pay the obligation of another.

In passing upon the act Mr. Justice Fullerton, in speaking for the Supreme Court of the State of Washington, in the case of *State ex rel Davis-Smith Co. vs. Clausen*, *supra*, said:

“If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights.

“That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accident in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. * * * The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases; cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument.”

Counsel for the plaintiffs in error state in the opening part of their brief that they do not want to be understood as questioning the constitutionality of this act and something is said as to the senior member of the counsel responsible for the brief, having been connected with the preliminary work of submitting a draft of the law for consideration by the legislature, and it seems to us that the position later taken under the second section of the brief,

as well as the argument, is inconsistent, for under his argument, the act could equally well be declared to be unconstitutional for the reason that it does not apply to workmen in all classes of employment, extra hazardous and otherwise. He refers to an employe in a grocery, such an employe he understands not to be under the act; and he could equally say that the plaintiffs in error, if Meese had been killed as a result of negligence on the part of the brewery, were deprived of the equal protection of the law because they could not sue the brewing company direct, while the employe of the grocery company was given that right as against his employer.

The statute being but an exercise by the state of its police power, under the authorities cited and discussed in the opinions of the Supreme Court of the State of Washington and of Judge Cushman, we submit that there is no such discrimination as brings this phase of the act within the scope of the authorities referred to in his brief, all of which were before both the Supreme Court and the District Court in the two cases referred to, and without encumbering this brief with a citation of a long list of authorities, we are content to rest upon the interpretation and construction so given to this act, and upon the authorities and decisions quoted in such cases. We

quote, however, from Judge Fullerton's opinion in the case of *State ex rel Davis-Smith Co. vs. Clausen*, *supra*, as follows:

"It is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally or applying it to the use of the state at large. * * * The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large."

And in the earlier part of the opinion:

"It is well settled that neither the clause of the state constitution prohibiting class legislation, nor the clause of the fourteenth amendment to the constitution of the United States relating to the equal protection of the laws, takes from the state the power to classify in the adoption of police regulations. The limitations imposed admit of a wide discretion in this respect, and avoid only what is done without any reasonable basis; that is, such regulations as are in their nature arbitrary. The learned counsel for the auditor recognize this distinction, and consequently do not attack the act because it is confined to extra hazardous occupations as its field of regulation, but complain because its benefits are not confined to workmen injured while engaged in such occupations."

III.

The plaintiffs in error further urge as a third ground for reversing the judgment entered by the district court that in any event they are entitled to recover medical bills and funeral expenses. A complete answer to this contention is that the complaint is not drawn upon any such theory. The action is based upon the theory that the defendant is liable for the wrongful death of the decedent, and damages upon that theory are sought to be recovered. No such position was taken before the learned district judge, and this theory as now presented is a mere afterthought.

Another complete and conclusive answer to this position is that assuming that the defendant may be liable for doctor bills and funeral expenses, it is not claimed that the recovery in any event would exceed the sum of \$800.00, and that being true the district court would not have jurisdiction and the demurrer even if the case was considered as being brought upon that theory was properly sustained.

In *North American Transportation & Trading Co. vs. Morrison*, 178 U. S. 262; 44 L. Ed. 1061, the Supreme Court in considering a similar contention says:

“But where the plaintiff asserts as his cause of action a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum clause* will not confer jurisdiction on the circuit court, but the court on motion or demurrer, or of its own motion, may dismiss the suit. And such, we think, was the present case.”

In *Horst et al vs. Merkley et al*, 59 Federal 502, we quote from the *syllabus*, opinion rendered by Justice Gilbert:

“When it appears from the plaintiff’s own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not of sufficient value to support the jurisdiction, the case must be dismissed.”

In *Maxwell vs. Atchison etc. Ry. Co.*, 34 Federal, 290, from the Circuit Court for the Eastern District of Michigan, the court said:

“It seems to me that wherever it appears clear from the plaintiff’s own statement, or the testimony of his witnesses, that a verdict of \$2,000.00 would be so grossly excessive as to require the court in the exercise of its judicial discretion to set it aside, and direct a new trial, it is equally its duty to dismiss the case for want of jurisdiction.”

Authorities without number upon this same question could be cited, but the authorities referred to are sufficient to dispose of this last contention made by the plaintiffs in error.

We respectfully submit that the learned district

judge correctly construed the compensation act of the State of Washington, that under the terms of the act plaintiffs in error are accorded a sure and definite relief, and, under the act as a whole, actions of this character have been withdrawn from the jurisdiction of the courts; and that the learned district judge was right in sustaining the defendant's demurrer and entering a judgment of dismissal.

Respectfully submitted,

C. H. WINDERS,
Attorney for Defendant in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PACIFIC TOW BOAT COMPANY, a
Corporation of the State of Washing-
ton, Owner of the Tug "Argo,"
Appellant.

VS.

IVOR NORDSTROM, Intervener,
Appellee.

"IN THE MATTER OF THE PETI-
TION OF THE PACIFIC TOW
BOAT COMPANY, a Corporation of
the State of Washington, Owner of
the Tug "Argo" for Limitation of
Liability."

BRIEF FOR APPELLANT

C. H. HANFORD,
Proctor for Appellant.

Filed this.....*day of September, 1913.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

FILED
SWAN & HANFORD CO. SEATTLE

AUG 27 1913



No. 2292.

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BRIEF FOR APPELLANT

The main question to be decided in this case is whether the Intervener, Ivor Nordstrom, has a valid claim against the Tug "Argo" or her owner for damages on account of an injury which he suf-

ferred while at work on board of her as a member of her crew.

FACTS.

1. The appellant is a corporation and, at the time of the injury to appellee, was the owner of the Tug "Argo" and operating her as a towing vessel upon the waters of Puget Sound.

2. The appellee was employed as a member of the regular crew of the Argo in the capacity of fireman, and had been so employed for a period of five or six weeks preceding his injury.

3. It was part of the appellee's duties, as fireman to oil the engine. The same being a compound engine of the kind in general use on Puget Sound tugs.

4. The engine is situated in the lowest space in the hull and, within its frame, there is a space called the crank-pit within which the cranks revolve.

5. On the night of November 22, 1910, the "Argo" was going at full speed on a run from Richmond Beach to Seattle in heavy weather and, while the appellee was in the performance of his duty, the boat lurched, causing him to lose his balance and, by contact with one of the cranks of the engine, his left foot was crushed.

6. After being in a hospital several weeks, where he was treated by a surgeon of the Marine Hospital Corps of the United States, the appellee's leg was amputated between the knee and the ankle.

7. To recover damages for said injury, the appellee commenced an action in the Superior Court of the State of Washington against the appellant; the amount sued for being in excess of the value of the "Argo."

8. Thereupon the appellant instituted this cause and the further prosecution of said action in the Superior Court was enjoined.

9. In response to the notice requiring claims for damages to be presented and proved, the appellee appeared and filed his claim for damages and, also, filed an answer to the appellant's petition in the United States District Court for the Western District of Washington.

10. The cause proceeded in said District Court to a final decree, by which the appellant was awarded damages in the sum of \$5000.00, with interest on that sum from the date of the injury, and costs.

11. The specified ground of liability of the "Argo" and her owner is, alleged negligence in not providing a sufficient barrier across the open spaces between the upright columns, or standards, of the engine so as to prevent employees from falling, or stepping, into the crank-pit; and in having and maintaining, across said open spaces, a sheet of thin metal the top edge of which was bolted to the columns and the bottom of which was not fastened but was loose and yielding and acted, as alleged, like a trap in admitting the appellee's foot to enter the crank-pit and impeded its withdrawal.

(All of the evidence, descriptive of the engine, crank-pit, engine room and the sheet of thin metal, is reproduced in the appendix to this brief. And, for convenience, there is also appended, a cut made from a photograph of the engine. This is not evidence but is like a mere diagram drawn on paper or a blackboard and is intended for no other purpose than to assist counsel for the parties in the effort to explain the evidence.)

ERRORS ASSIGNED.

1. The District Court erred in finding and deciding that the injury suffered by Ivor Nordstrom was caused by an appliance or equipment of the tug "Argo," referred to in the Court's written decision as "the offending shield or guard."

2. The District Court erred in finding and deciding that the so-called shield or guard referred to was a dangerous contrivance.

3. The District Court erred in finding and deciding that the so-called dangerous contrivance had been continuously maintained for four years and that continuous maintenance thereof was negligence imputable to the owner of the "Argo."

4. The District Court erred in failing to find that the injury suffered by Ivor Nordstrom was caused by lurching or rolling of the "Argo" and by the crank of her engine which was not defective.

5. The District Court erred in failing to find that the injury suffered by Ivor Nordstrom was

caused by an ordinary accident comprehended in the risks incidental to his employment and assumed by him.

6. The District Court erred in failing to find that the only negligence involved in the cause of the injury suffered by Ivor Nordstrom was chargeable entirely to a fellow-servant to-wit: the engineer of the "Argo" in misplacing the so-called shield or guard and failing to keep it securely fastened; and contributory negligence of said Nordstrom.

7. The District Court erred in awarding to said Nordstrom an excessive amount of damages.

8. The District Court erred in awarding to said Nordstrom interest from the date of his injury on the \$5000.00 assessed as his damages.

9. The District Court erred in rendering a decree in favor of said Ivor Nordstrom and against the petitioner.

POINTS AND AUTHORITIES.

Faulty construction, equivalent to unseaworthiness of the vessel and injury suffered as a consequence of the specified fault are necessary to be shown by the appellee in order to entitle him to any amount of compensation other than wages and the expenses of his cure.

The Osceola, 189 U. S. 158, 23 Sup. Ct. Rep. 483, 47 L. Ed. 760.

The Esperanza, 133 Fed. 1015.

The Mars, 138 Fed. 941.

Same case, 149 Fed. 729.

The Osceola case established the general rule. The cases cited from the Federal Reporter were decided with reference to that general rule and are useful merely as illustrative of its application.

There is no evidence in the case, descriptive of the manner in which the appellee was injured, save his own uncorroborated testimony. It is a physical impossibility for the accident by which he was injured, to have happened in the manner described by him and, his testimony being unbelievable, there is no evidence to support a decree in his favor.

There is a total failure of proof to sustain the allegations of the appellee's pleadings charging defectiveness or insufficiency of the sheet metal guard attached to the Argo's engine, either in the guard itself or the manner in which it was connected, or in misplacing it, or in looseness or lack of secure fastenings.

The burden of proof rests upon the appellee to show affirmatively lack of ordinary care in failing to provide or keep in order appliances required for reasonable safety.

Johnson vs. Frederick Leyland & Co., 153 Fed. 572.

The Henry B. Fiske, 141 Fed. 190.

Where a ship owner provides necessary equipment and appliances, neither he nor the ship incur liability for personal injuries to a member of the crew resulting from negligence of the master and officers in charge of her in failing to use and keep

in place moveable equipment and appliances, such as hatches or fastenings to close openings into, or through which, he may fall or be thrown by the lurching or rolling of the vessel.

Olson vs. Oregon Coal & Navigation Co., 96 Fed. 109.

Judge DeHaven's decision in that case was affirmed by this Court in 104 Fed. 574, and is fully sustained by the Supreme Court in the *Osceola* case.

The question as to seaworthiness and sufficiency of equipment and appliances is to be determined with reference to the customs and usages of the port or country to which the vessel belongs, the existing state of knowledge and experience, and the judgment of competent persons versed in such matters.

25 *Am. & Eng. Enc. Law*, 2nd Ed., p. 125 (VI, 1.)

By the decision and decree of the District Court, interest on the sum awarded as damages, from the date of the injury was allowed. Such additional allowance is unwarranted by law and conflicts with the decision of this Court in the case of *Burrows vs. Lownsdale*, 133 Fed. 250.

ARGUMENT.

There is not in the testimony any intelligible description of the *Argo's* engine, giving measurements or exact information as to its general description or

style. On page 40 of the Apostles, in the testimony of the witness Brownfield, it is called "an ordinary 41½ compound engine;" and on pages 150-1, in the testimony of the witness Studdert, it is called a "fore and aft compound," its size is "9-22-20" and "it has three columns on its open face."

Steam engines differ, in the details of their construction, as much as the vessels they are placed in differ in dimensions and interior arrangements. Hence, only to a very limited extent can general knowledge of mechanics be relied upon to supply deficiencies of evidence descriptive of an engine and its attachments necessary to an intelligent or fair adjudication of a controversy respecting alleged defects.

In this case it will be impossible to write an opinion containing a description of the Argo's engine and attachments made up from the evidence submitted.

The learned Judge who rendered the decree appealed from, appears to have given deep study to questions of practice under the limited liability law, but, from his written decision, it is clearly apparent that he did not attempt to analyze the evidence relating to the alleged defects in equipments and appliances on which the charge of negligence is based.

Without understanding the engine or equipments of the engine room, he accepted the conclusions of witnesses that there was a defect notwithstanding

an overwhelming preponderance of contradicting evidence.

The District Judge probably based his decision upon a vague idea that the thing which he styled "the offending shield or guard" was a piece of sheet iron of the thickness and strength of stove pipe iron hung by bolts at the top edge on vertical standards and loose at the bottom like a flap that would yield to slight pressure, and that there was nothing whatever to check a person's foot from slipping upon the floor of the passage way against such flimsy iron in a way to bend it inwards.

It is the appellant's contention that the evidence is too meagre to justify any such impression, or to support a finding that the so-called shield or guard was weak or insufficient, or that there was not a substantial guard to prevent a person's foot from slipping into the crank-pit, and, for lack of evidence to sustain the allegations of his pleading, the appellee has failed to prove any right to recover damages.

The meagreness of the evidence imposes very little burden upon the Court in scrutinizing it, but the facts which it does disclose should not be ignored, nor should its vagueness be held to justify an affirmative decision in favor of the party having the burden of proof.

One of the facts proved is, that there was a foot board or strip of timber on the floor of the passage way next to the frame of the engine (Apostles, p. 164).

Another fact is, that the floor was elevated about two inches above the horizontal frame or bed of the engine, (page 34).

Another fact is, that the columns of the engine on the side next to the passageway were three in number (p. 151) and that they were not vertical but inclined inward, that is to say, leaning inward towards the center of the engine frame, (page 53).

Another fact is, that the sheet iron guard was one-sixteenth of an inch thick, (pages 35-198). Such a piece of galvanized iron is substantial and has strength sufficient to require great force to make it bend.

Another fact is, that instead of being loose at the bottom, the sheet of metal was set up with its bottom edge resting upon the bed of the engine and wedged into a thin space between the columns and bolt heads or nuts which kept it from bending inward. (Pages 50, 166-7; 171; 199.)

Another fact is, that the spaces between the columns is only twenty-four inches wide. (pp. 49-53-66-164-177.)

Another fact is, that the reverse shaft is attached to the columns and crosses the spaces between them. (p. 214-15.)

Having in view the facts proved, four years of continuous service in the manner in which the guard was placed and maintained does not prove negligence but is an important circumstance tending to prove its reasonable sufficiency, for the reason that,

if it were a dangerous trap, some one of the experienced engineers and firemen who worked in that engine room, or the inspectors who annually made an official inspection of the vessel, would have condemned it.

The estimated width of the spaces between the columns, according to the most reliable evidence, is about two feet. As there is no accurate information such as could have been supplied by actual measurements, it must be assumed that the columns were **approximately two feet apart**. They were about five feet high. (p. 53.) The strip of sheet metal attached to them, and crossing the intervening spaces, is eighteen inches wide (p. 49); the top edge of the same is attached by "U" bolts to the columns (p. 35).

Without any holder at the bottom edge, it was a barrier across those open spaces, eighteen inches above the floor, sufficient to prevent a careless or blind man from walking into the crank-pit. Then another barrier, that is the reverse shaft, was attached to the columns, constituting a second and higher cross-bar.

It is going beyond the limits of reasonable argument to say that two cross bars, on standards only **two feet apart**, the lower one being eighteen inches above the floor, and a foot-rail on the floor next to the columns, were insufficient to afford reasonable protection.

By the standard of general custom in the equipment of steamboats and the judgment of competent

men, versed in such matters, the Argo's engine room was a reasonably safe place to work in.

The appellee's witnesses, whose evidence has a bearing upon this point, were Brownfield, Chesley, Ossinger and Wright, neither of whom could give the name of any steamboat, resembling the Argo, having a guard fastened to the foot of the columns of her engine.

Mr. Brownfield was the second engineer on the Argo at the time of the accident and had been for several weeks. He probably had occasion to remove and replace the so-called guard more than once and, whether he did or not, the thing itself and the fastenings were visible, and, if he were a competent witness to give expert evidence to prove negligence in misplacing or lack of adequate fastenings, in the observance of ordinary care for his own safety, he should have remedied the defect, or at least, have made complaint concerning it. To himself, his shipmates and his employers, he owed a duty so to do. His failure to so act is a fact that outweighs, in probative force, all his testimony tending to prove negligence in this case.

There is no more reliable test for determining the question as to negligence of an employer, in failure to provide or maintain a safe place for employees to work in, than the rule that the degree of culpability, essential to create liability to render compensation to an injured employee, consists in failure to observe that degree of care which a person of

ordinary capacity and prudence habitually observes for his own safety.

Application of this test raises the following questions:

Is Mr. Brownfield a man of ordinary capacity and prudence?

Is he a man having sufficient experience in the operation of machinery to be a competent judge of the requirements as to safety appliances?

Did he have ample opportunity to see and know of any defects in the Argo's engine, and its attachments, rendering it unsafe for a person to work about?

Did he discover or have knowledge of such defects previous to the accident in question?

A negative answer to the last question and affirmative answers to each of those preceding should absolve the appellant from liability for the reason that a practical application of the test proves that a man of ordinary capacity and prudence, for his own safety, failed during several weeks of time to discover a danger which if existing would have menaced him continually while he was performing the duties appertaining to his vocation. Therefore, there was no such danger. And, if answered differently, he will be disqualified as an expert witness.

Mr. Chesley was manager of the appellant company when the "Argo" was built and responsible for due care in the original construction and equipment. His testimony cuts two ways.

If his culpability was sufficient to subject the appellant to liability, his testimony, in so far as it

tends to prove failure to provide and keep in order **the equipment necessary for safety**, is the testimony of a stultified witness.

His testimony, however, is not strong, viewed as a confession of his own negligence. The Court will not find in it any satisfactory basis for sustaining the decision of the District Court.

A sheet of galvanized iron one-sixteenth of an inch thick is sufficiently rigid and firm to constitute a guard to prevent a person from stepping into a crank-pit. The most that can be truthfully said in condemnation of the guard in question is that it was not fastened at its bottom edge, or, that it was misplaced by being inside instead of outside of the columns.

If there was a fault in either of those particulars, it was due to an error of judgment, or negligence, of officers in charge of the navigation of the vessel, for which, no liability attaches to the vessel or her owner. (*The Osceola*, 189 U. S. 158; *Olson vs. Oregon Coal & Navigation Co.*, 96 Fed. 109; 104 Fed. 574.)

There is no difference in principle between failure to keep a port closed or a hatch covered and mere neglect to securely fasten a moveable obstruction at the open spaces of an engine.

Engines are made for use necessarily attended with danger, and reasonable care for safety of engineers and firemen does not require, nor justify, **fencing or casing** impeding access to their interior parts.

According to the testimony of competent marine engineers, superintending the operations of most of the tugs on Puget Sound, sheets of thin metal or canvas are used to prevent the spattering of oil about the engine room, and are not attached as permanent fixtures nor intended to be impassable barriers to shield employees from every possibility of being hurt.

The sheet of metal in question, as it was placed in the *Argo*, was sufficient for the service intended and similar to appliances in general and constant use on similar vessels. In proof of this, we cite the testimony of Studdert, pp. 150-155-157-169-170-171-172; Lovejoy, pp. 175-177-178-179 and 181; Ramwell, pp. 184-185-186-187 and 188; Anderson, pp. 196-199; Primrose, pp. 210-211-214-217-218-219 and 222.

In the trial of the case in the District Court, the main ground of defense against the appellee's claim was that the engine of the *Argo* and its attachments were installed in the ordinary manner according to the customs and usages generally observed on Puget Sound, and that a special guard to prevent stepping or slipping into the crank-pit is not, in the judgment of competent persons, versed in such matters, requisite for seaworthiness or safety of the crew.

That theory of the defense has been well supported by the testimony cited and appears to have been entirely ignored in the decision rendered.

We maintain that it is a valid and complete defense.

Until the idea of making business bear the financial burden of compensating workmen for injuries suffered in performance of labor, regardless of the natural obligation to render compensation for the consequences of wrongful conduct, shall become crystallized into law by legislative enactments, the rights and liabilities of litigants, in cases like this one, are governed by rules laid down by the Supreme Court in the *Osceola* case.

The piece of sheet iron in question did not inflict, nor cause, the injury. The initial cause was lurching of the vessel, which was an ordinary occurrence incidental to navigation; and the appellee was hurt by contact with a rotating crank working in no unusual manner.

The injury, therefore, was an accident incidental to the employment in which the appellee voluntarily engaged, affording no ground for a claim other than for wages and expenses for which he has not sued.

It is not the policy of maritime law to commercialize personal injuries, and courts of admiralty do not award exorbitant damages.

In this case \$5000.00 is in excess of fair compensation, and interest on that sum, from the date of the injury, augments that allowance without warrant of law and contrary to the decision of this Court in the case of *Burrows vs. Lounsdale*, 133 Fed. 250.

The appellant respectfully submits that the decree should be reversed.

C. H. HANFORD,

Proctor for Appellant.

APPENDIX.

TESTIMONY DESCRIPTIVE OF THE ARGO'S
ENGINE.Apostles
Page 32

FRANK. C. BROWNFIELD, produced as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. HALL:

Q What is your name?

A Brownfield, Frank C. * * *

Q Where were you employed on the 22nd day of November, 1910? P. 33

A On the tug 'Argo,' Pacific Tow Boat Company.

Q How long had you been employed there?

A From the 5th of October.

Q 1910?

A Yes.

Q What was your position on the boat?

A Second engineer. * * *

Q Will you describe the position and condition of what is known as the crank-pit? P. 34.

WITNESS: (Interrupting)—The position and condition of it as it was on that boat,—on the 'Argo'?

A The position of it,—it is just a pit, an encasement that the cranks revolve in that is set down about 2 or 3 inches lower than the floor.

Q And what was in that crank-pit? * * *

A The cranks revolved in that pit.

Q What was on either side of the crank pit,—was there a passageway?

A There were 2 crank-pits,—one for the high press crank and one for the low,—and then there is the front of the engine, is where the fire room is located, and there is a floor there, and at the back, just aft of the engine there was a floor over the shaft,—you could walk around there, too.

Q State whether or not there was a passage way for the employees or people on the boat on either side of the crank pit? * * *

35.

A No; there is no passage way on one side of it.

Q There was a passage way on the other side of it, though?

A Yes, on the other side of the engine.

Q Was there a shield or guard around, separating this passageway from the crank-pit?

A On the open side of the engine, yes—in fact, there was a guard on both sides.

Q Well, of what was that guard constructed?

A About 16th sheet iron.

Q And what was it fastened to? * * *

A It was bolted to the top with “U” bolts, bolted on the columns.

Q Was it fastened at the bottom?

A No, sir.

Q Was it on the inside or outside of the columns?

A On the inside of the columns.

Q You mean by that, the inside toward the revolving cranks?

A Yes, sir * * *

Q You say this crank pit was lower than the floor? P. 37-8.

A It was, yes, a little.

Q It was lower?

A Yes.

Q Do you remember how many cranks were in that pit?

A There is only one crank in each pit.

Q One in each pit?

A Yes, sir.

Q And was there just one pit guarded by this guard?

A The whole front of the engine was guarded—I mean the open face of the engine.

Q Well, how many pits?

A Two. * * *

Q You stated a little while ago that the lower part of this guard was not fastened to the column?

A No, it was not.

Q Was that noticeable except upon quite a careful examination? * * *

A The average person would not have noticed it; in fact, the average engineer would not. * * *

CROSS EXAMINATION.

BY MR. BYERS.

* * *

40. Q Now, this engine that you speak of—that was an ordinary $4\frac{1}{2}$ compound engine?

A Yes, sir.

Q It was set in the hold of the boat in an ordinary way?

A Yes, sir.

Q The boiler was set about how far forward?

A I don't remember.

Q Well, it was 6 or 8 feet?

A Yes. That does not make any difference, any-way. * * *

41 Q And then there was a passageway around back of the engine shaft, there being a floor laid over the shaft?

A Yes, sir.

Q It is usual in the ordinary way that engine and fire rooms in this class of boat are constructed, as far as you know?

A Well, boats of that size, yes. * * *

42-3. Q These cranks were in plain view, were they—as a matter of fact?

A Yes, as plain as any other part of the engine.

Q And about at what rate were they revolving?

A About 120.

Q Then that crank shaft would be going through there at 240 times a minute, would it?

A Going around about 120 times a minute, you mean.

Q And there were two crank shafts, were there?

A No, just one.

Q There were two cranks to this engine—one to the high pressure and one to the low, and each of these cranks were passing through there—the pit—at the rate of 120 times a minute?

A Yes.

Q Now, these cranks were traveling through there so rapidly, weren't they, so that anyone would know, and especially one who was a fireman, that if he got his foot into that pit that he could not extricate it in time to help it from being torn off or being very badly injured?

A *Certainly not.* * * *

Q You had been working on this "Argo" for P. 44.
how many months or years, or what length of time?

A Since the 5th of October, that year.

Q And during all of that time, this guard, or what you call a guard, was in exactly the same condition as it was the night when he was hurt?

A Yes, sir.

Q As a matter of fact, this boat had been inspected during that time, had she not?

A During which time?

Q During the time you worked on her?

A She was inspected while I was on her.

Q And she had been inspected prior to the time you were on her?

A Yes, I suppose so.

Q And, as far as you know, this guard was in the same condition at the time of her prior inspections, and at the time of the injury, as it was and had been ever since the boat was built?

A As far as I know—yes.

Q Now, as a matter of fact, Mr. Brownfield, this guard that you speak of, is primarily intended to keep the oil from splashing out of the crank pit, isn't it?

A Oh, they do that—they keep the oil from spluttering out, all right. * * *

P. 47.

RE-DIRECT EXAMINATION.

BY MR. HALL:

* * *

P. 49.

Q How high was this guard?

A About a foot and a half, or something like that.

Q How wide was it?

A It extended along in front of the two crank pits, about, I guess, about four feet? * * *

P. 50.

RE-CROSS EXAMINATION.

BY MR. BYERS:

Q You gave the height of this guard as about 18 inches?

A As near as I can remember.

Q You mean above the engine frame?

A No, I gave it as the width of the sheet iron piece.

Q Now, that width stood up on the engine frame, did it, on the bed?

A Yes.

Q Then how deep is that frame or bed, as you call it?

A How deep?

Q Yes.

A Six inches.

Q That engine frame sets on the engine bed; the engine bed is built into the boat upon timbers, isn't it?

A The engine bed is the cast iron bed.

Q The metal of this engine bed is how thick?

A The metal—oh, about 1 1-4 inches.

Q About 1 1-4 inches?

A Yes, sir—they are cast hollow.

Q I want you to tell how far about the foot of the columns these so-called guards reached. Do you understand what I am trying to get? How far was it from the engine bed down to the floor?

A To the floor that you walk on?

P. 51.

Q Yes?

A The bed was below the floor.

Q You are certain of that, are you?

A Yes. In front —

Q Now, this engine bed is set on what?

A Set on timber.

Q Set on timber?

A Yes.

Q And, as a matter of fact, that engine bed is a frame of iron which stands up about six inches?

A Yes.

Q Now, do you mean to say that flooring is six inches thick?

A The flooring there was about inch planks.

Q Then, as a matter of fact, the top of the engine bed would be about up five inches above the flooring?

A No.

Q Then, you mean to state that the flooring on the side, starboard side of the engine, was raised up on false work on 2x4's, so as to bring it up higher than the rest of the engine bed?

A Yes, it was that way. There is hardly any boats that way, rigged exactly with the floors above the beds that way; they are mostly flush right with the beds or a little below the beds—that is, boats of that size. Of course, some of these smaller ones the crank-pits are down in the bilge.

Q Mr. Nordstrom was a fireman, and was a fireman all the time that he was there?

A Yes, sir.

Q And, consequently, working around this engine, his duties kept him in the engine room all the time he was on duty?

A Yes, and the firing room, which was all one.

Q All one—and are a room of approximately—of what size?

A I don't know. I could take a rule down and measure. * * *

Q Just approximately. I am not asking you for exact figures, I just want as near as you can estimate it.

A Well, the room, with the space that is taken up by the engine, the plant, boilers, engine and everything, is on that boat about 12 feet wide and—oh—about 30 feet long—somewheres about that.

Q But the room from the after end of the boiler to the aft end of the engine was probably about 10x12, isn't it, approximately?

A Yes, about. Well, I guess a little longer.

Q And this guard is, as a matter of fact, considerably longer than you estimated it. It is nearer 7 feet than 4, lengthwise of the pan, is it not—that is, the length of it? You estimated it about 4 feet.

A Oh, you mean of this sheet. It has been quite a while since I have been there. I cannot. Oh, I guess about as long as this table. P. 53.

MR. HALL: Well, about how long—we cannot have the table there—about how long, approximately?

A I don't remember—put it down 4 feet, because I don't remember. Gee whiz! A man's got a memory—

Q Now, these columns to the engine don't go straight down, or perpendicular, do they?

A No, sir.

Q They don't?

A No, sir.

Q About what angle do they go from the cylinders down to the engine bed? Perhaps to make that clearer, if they were absolutely——

A I know what you mean.

MR. BYERS: I was trying to get it so it would appear in the record as plain as possible. How long are the columns in the first place?

A They are about five feet.

Q Five feet? Now, how much did they average from the perpendicular?

A They would be about 10 degrees.

Q How? In the revolutions of the cranks at their extreme limits—how far?

A That low press column on her, I think, was perpendicular—no, it was not, either—I am getting that mixed up with some other boats.

P. 54. Q Now, the question is this: The cranks in revolving came approximately how far from the columns, that is if the column was placed immediately opposite the crank, how far would the crank come from hitting it as it revolved?

A On her, she runs pretty close to the column.

Q On her, she runs pretty close to the column?

A Yes, sir.

Q And now you say that this guard was fastened only at the top?

A Yes, sir. * * *

W. R. CHESLEY, produced as a witness on be-

half of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. FULTON:

Q What is your name?

A W. R. Chesley. * * *

Q Do you know what there was in the way of a P. 56-7.
passageway around the engines and crank pit?

A Well, I know that there was a passageway there, yes, sir.

Q What was this used for?

A Well, for going past the engine, to attend to any of the machinery which was abaft of the engine. * * *

Q Now, do you know what there was constructed or maintained upon this passageway, if anything, in the way of a guard for the protection of employees or persons using it?

A You mean in regard to the engine?

Q Yes?

A I know there was a guard put up there.

Q That was?

A At the time she was built.

Q For what purpose?

A To protect persons from falling into the machinery and crank-pit.

Q Crank-pit?

A Yes, from stepping in.

Q Now, what knowledge have you of the installation of this guard?

A As to the detail, none, any more than to have seen that it was there.

Q As to any part of it, what knowledge have you?

A Nothing more than to see this guard of iron along there. * * *

P. 62.

CROSS-EXAMINATION.

BY MR. BYERS:

* * *

P. 65.

Q Now, then, what is contained in this crank-pit?

A It is the main shaft and connecting rod principally.

Q The connecting rod is the rod that leads from the piston to the crank shaft?

A Yes.

Q Now, that connecting rod is fastened to the crank shaft, how?

A Usually by a strip going around the crank shaft, and coming up and the connecting rod is bolted to it.

Q Then that leaves a projection on one side of the crank shaft?

A Yes.

Q And on the other side of that projection what is there?

A On the opposite side of the crank shaft?

Q Opposite to this fastening which you have described, what is there on the other side of the crank shaft?

A Well, I would not think there would be anything opposite to that fastening. Sometimes there is a balance on the opposite side.

Q Now, this counter-balance and what you say is the fastening between the connecting rod and the crank shaft, make practically two large spokes that revolve in the crank pit?

A As it balances on one side and the offset in the shaft would be opposite to it.

Q Yes; now this revolves in that crank-pit?

A Yes, sir.

Q Now, how rapidly did this engine turn it when it was going at full speed.

A I presume at 110 to 130 revolutions. * * *

Q How wide is each crank pit?

A I should judge possibly 24 inches or such a matter.

Q Yes; now, in that crank-pit there is revolving a crank shaft with its projection and the counter-balance on the other side so it makes a heavy mass of iron turning in that crank-pit twice the number of the strokes of the engine?

A Yes.

Q So it will be revolving when it is going, say, full speed at the rate of 240 to 260 revolutions a minute?

A Possibly. I am not versed in those things.

Q Then the connecting rod and this counter-balance and the crank shaft are all in plain view of one working about the engine?

P. 67. A Yes.

Q And are revolving about the rates at which you describe?

A Yes. * * *

P. 70. Q This boat and its engine are constructed and installed practically the same as all other boats of that type?

A Yes, practically the same.

Q And isn't this splash pan or guard placed in there practically the same as in all other boats of her type?

A No; each engine might be constructed a little different to that.

P. 149. H. S. STUDDERT, produced as a witness on behalf of the Petitioner, being first duly sworn, on oath testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q Your name is H. S. Studdert?

A Yes, sir. * * *

P. 150-1. Q I would ask you whether or not that engine room was completely equipped substantially as all other vessels of the type of the Argo?

A Yes, sir, just the same, just as substantially.

Q What kind of engine?

A fore and aft compound.

Q What is its size?

A 9—22—20.

Q It has three columns on its open face?

A Yes, sir.

Q And the engine faces toward the starboard side of the boat?

A Yes, sir.

Q Could you tell us the size of the boat?

A The boat, I think, is 64 feet long, 20 foot beam, and I am not positive, but I think 9 foot hold. * * *

CROSS-EXAMINATION.

P. 153.

BY MR. HALL:

* * *

Q The crank-pit is below the floor, is it not?

P. 155-6.

A The crank-pit is always below the floor.

Q Are you sure of that? * * *

Q You made an inspection of this guard?

A Yes, sir, I noticed the splash pan or guard.

Q You call it splash pan and I call it guard, it is the same thing.

A Just a piece of light sheet iron.

Q What thickness was it?

A It is not a sixteenth of an inch, it is very light.

Q Now, did you know at the time that you assumed your duties that it was unfastened at the bottom?

A I knew it was simply laid in there. * * *

RE-DIRECT EXAMINATION.

P. 163.

BY MR. BYERS:

* * *

P. 164.

Q As a matter of fact, was it or was it not perfectly open and apparent that if he did stick his feet into the crank-pit he would get hurt?

A Certainly.

Q These openings that he could possibly stick his feet through are about how big?

A I never measured them, I think about eighteen or twenty inches probably.

Q And at the foot of these columns and outside was a two by four?

A There was a small board. I don't know what size it was. There was a stick there.

Q About the size of a two by four?

A I could not say.

Q And at the top of these were the cylinders and their casings so that in case of a lurch of the vessel or anything of that sort he could put his hands against these projecting things and keep from going in?

A Yes, sir. * * *

P. 165.

Q What is that crank pit for?

A It's a space made for the cranks to go around in.

Q What is the pit for?

A Just a space so as the shaft will revolve.

Q And there is where all the oil and drippings go into?

A Yes sir.

Q And the crank shaft with its counter balance—

A Picks it up.

Q And the straps are revolving around in the crank pit?

A Yes sir.

Q So that when the oil collects—

A It picks it up and throws it over the boiler and over the engine room.

RE-CROSS EXAMINATION.

BY MR. HALL:

* * *

Q You say they made that inspection when the guard was in the same condition it was when Iver was injured? P. 166.

A You speak of the inspection after the accident?

Q Yes.

A No, it was outside then, I changed it.

Q You are positive of that?

A Absolutely.

Q The bottom was loose the same as it was—

A Every inspection until after he was injured.

Q How do you know it was loose?

A It wasn't exactly loose, it was held sufficiently to stay there.

Q There was no bolt?

A It was inside the heads of some bolts.

Q And was not fastened with any bolts?

A It was simply inside the bolts.

Q It was put in there as a splash pan, it wasn't put there with the idea of being a guard and therefore wasn't made substantially, it was not made for the purpose of being a guard?

A It was a splash pan.

Q That being the case, it did not make any difference whether the bottom was loose or not?

A Yes.

Q How was the top fastened?

A By U bolts.

P. 167. Q You could see that the bottom was unfastened?

A The bottom went inside some bolts to hold it.

Q They were not strong enough so that if a person was thrown with his feet against the bottom of it to withstand the pressure?

A It was never put in there for a guard.

Q It wasn't strong enough for that purpose?

A Yes. * * *

P. 171. Q Now, without a guard of some kind there, if the crank pit is lower than the floor, what is there to prevent a seaman from being thrown into the crank pit?

A There are columns there to catch on to.

Q How wide? How far apart are the columns?

A About eighteen or twenty-one inches in the Argo.

Q You think that is a sufficient guard?

A Yes sir. * * *

HOWARD B. LOVEJOY, produced as a witness on behalf of the Petitioner, being first duly sworn, on oath testified as follows: P. 174.

DIRECT EXAMINATION.

BY MR. BYERS:

Q State your name, Captain.

A Howard B. Lovejoy. * * *

Q Are you familiar with a vessel here known as the tug Argo? P. 175.

A Seen her, yes sir.

Q Are you familiar with her engine?

A Familiar with the ordinary fore and aft compound engine. * * *

Q I would ask you if the engine in the Argo is installed in substantially the same manner as in all other vessels of the type of the Argo?

A I think so, yes.

Q I call you attention, Captain, to that part or fixture on this engine known as a splash guard, I would ask if you are familiar with that appliance or appurtenance?

A Yes sir.

Q What is its purpose, if you know?

A It keeps the oil from splashing out on the floor.

Q What causes that oil to splash out?

A Revolving of the engines and drippings from the steam. * * *

CROSS EXAMINATION.

BY MR. HALL:

Q Captain, how is the engine installed in the Argo?

A Right into details, I could not tell you.

Q When did you examine it?

A I was aboard the boat the other day.

Q How long were you aboard of her?

A About half an hour.

Q Is that the only time?

A I was aboard the boat when she was building, but did not go into any of the details at that time.

Q You do not know as a matter of fact just how the engine is installed there, only in a general way?

A Yes sir. There is only one way to install an engine though.

Q Do you know whether the crank pit is lower than the floor?

A The crank pit is lower than the floor.

Q How much lower?

A I should think about probably fourteen inches. You have to have room in the pit to swing your cranks.

Q About fourteen inches?

A I have an idea that the bed is about fourteen inches.

Q Do you know how wide the standards are apart?

A I think about two feet.

Q Did you examine this guard that was on there?

A Not particularly.

Q You saw it?

A Yes, a piece of galvanized iron.

Q Do you remember how wide the passage way is around this crank pit?

A I think about three feet, about that, that is outside of the columns. * * *

H. RAMWELL, produced as a witness on behalf of the petitioner, being first duly sworn, on oath testified as follows: P. 183.

DIRECT EXAMINATION.

BY MR. BYERS:

Q State your name.

A H. Ramwell. * * *

CROSS EXAMINATION.

P. 185-6.

BY MR. HALL:

Q Are you familiar with the tug Argo?

A Yes sir.

Q Been aboard of her?

A Yes sir.

Q When?

A O, fifty times.

Q You say you are the manager of what company?

A American Tug Boat Company.

Q You have a sister tug to the Argo called the—

A Irene, yes sir, she is the same, has the same engine, you can hardly tell them apart.

P Q Is the crank pit and bed plate in the same position?

A Yes sir, exactly.

Q How much lower is that than the passage way?

A Do you mean on the Irene?

Q Yes.

A How much lower is the crank pit?

Q Yes, the bed plate.

A I should judge just about 12 or 14 inches. * * *

P. 194. CAPTAIN JOHN L. ANDERSON, produced as a witness on behalf of Petitioner, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q State your name.

A John L. Anderson. * * *

P. 195. Q Have you seen the tug Argo?

A Yes.

Q Have you examined her engines?

A Yes sir. * * *

Q State, Captain, whether or not the engine in the Argo is installed in approximately and practically the same way as all other vessels of her type and class?

A Yes, practically the same way as any other boat of her type.

Q Are you acquainted with what is known as a fore and aft compound engine?

A Yes sir.

Q Is that the kind of engine in the Argo?

A Yes sir.

CROSS EXAMINATION.

P. 196.

BY MR. HALL:

Q Captain Anderson, when did you say you saw the Argo, approximately, about one or two months ago?

A Sometime ago, I can't exactly remember. * * *

Q Now, Captain, you say that the Argo is fitted out and built practically the same as all other vessels of her class? P. 198-9.

A Yes sir.

Q What do you mean by that?

A By the engine, more particularly, as a rule they always have a boat built so that they fit in the bottom of the boat for the purpose of getting more power in towing.

Q That makes them a little lower in the crank pit?

A Than on passenger vessels, yes sir.

Q Do you have tugs on Lake Washington?

A I have had some.

Q You are not operating them now?

A No sir.

Q Mr. Byers, in describing this guard or splash pan, as he calls it, described it as sheet iron or tin, or iron, which is it on the Argo?

A I think it is one-sixteenth iron.

Q How is it fastened on the Argo?

A It was fastened on the inside of the columns when I saw it.

Q On the inside of the columns, which way was that?

A Toward the engine, it was fastened on the inside.

Q Was it fastened at the top and bottom, do you know?

A It was fastened at the top.

Q But not fastened at the bottom?

A It stands behind some studs so that they can slip it off quickly.

Q Well, you are quite positive that it was on the inside toward the cranks?

A Yes, sir. * * *

209. JAMES F. PRIMROSE, produced a witness in behalf of the petitioner, being first duly sworn, on oath testified as follows:

DIRECT EXAMINATION.

BY MR. BYERS:

Q State your name.

A James F. Primrose. * * *

210 Q Have you seen the tug Argo, belonging to the Pacific Tow Boat Company?

A The Argo? I have seen her, yes sir.

Q I would ask you to state whether or not you are familiar with the fore and aft compound engine?

A Yes sir.

Q Is the engine in the Argo installed practically the same as all other boats of her type and class?

A Practically, yes. * * *

CROSS EXAMINATION.

P. 211.

BY MR. HALL:

Q You are still in the employ of the Puget Sound Tow Boat Company?

A Yes sir. * * *

Q When did you make an examination of the Argo? P. 212.

A Probably two or three months ago, I can not state positively.

Q How complete an examination did you make?

A Went down and looked her over through the engine rooms.

Q Did you at that time examine this guard?

A Yes sir, splash plate, you mean?

Q I mean—You saw there a section or guard of sheet iron around the crank pit on one side toward the passage way?

A I saw a plate of thin sheet iron.

Q Where was that sheet iron fastened, to what was it fastened?

A To the columns.

Q On the inside towards the crank pit, or on the outside towards the passage way? P. 213.

A Towards the passage way.

Q At the top and bottom, too?

A Fastened at the top, I didn't notice particularly the bottom.

Q You say, Mr. Primrose, that the engine in the Argo is installed practically the same as it is in all other tugs of the class and type of the Argo?

A Of her class, yes.

Q You say practically, that means there is some difference?

A In installation as well as difference in makes of engines.

Q Is there any difference in installation with reference to the pit being lower than the passage way in some tugs?

A Practically the same, some tugs of the larger class will be put above.

Q And in the smaller?

A All small tugs have them in the bottom of the vessel.

Q What is the difference in height between this passage around the crank pit and the bottom of the pit itself?

A It varies from 8 to 16 inches, generally.

Q What would you say the depth of this crank pit is on the Argo?

A I should say about 12 or 14 inches. * * *

p. 214.

Q Have you any other thing across between the standards?

A Just an iron rod up above.

Q Is there an iron rod across the Argo's?

A No, hers is fastened around the columns.

Q How heavy is this iron rod?

A That is the reverse shaft, it is put there for the purpose of reversing the engines, and is made fast across the columns.

Q It serves then as a sort of protection, does it not? P. 215.

A My recollection of the Argo is that she has one too above this splash pan as we call it. * * *

Q How thick is this sheet iron on the Argo?

A Number 16, or number 18, I should judge. * * *



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PACIFIC TOW BOAT COMPANY, a
Corporation of the State of Wash-
ington, Owner of the Tug "Argo,"

Appellant.

VS.

IVOR NORDSTROM, Intervener,

Appellee.

"IN THE MATTER OF THE PETI-
TION OF THE PACIFIC TOW
BOAT COMPANY, a Corporation
of the State of Washington, Owner
of the Tug "Argo," for Limitation
of Liability."

FILED

SEP 4 - 1912

F. D. MONCKTON,
CLERK.

BRIEF FOR APPELLEE.

WALTER S. FULTON,
CALVIN S. HALL,
HOWARD G. COSGROVE,

Proctors for Appellee.

Filed this-----*day of September, 1913.*

FRANK D. MONCKTON, Clerk.

By-----*Deputy Clerk.*



No. 2292.

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of Liability."

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant, at the time of the injury to appel-
lee, was the owner and operator of a large line of
tugs on Puget Sound, one of which was the Argo.
Appellee, Ivor Nordstrom, who was then twenty
years of age and inexperienced as marine fireman,
entered the employ of appellant October 15th,
1910, on the Argo, and his duties consisted of fir-

ing and oiling. He was employed by H. S. Studdert who was at that time and had been for several years Port Engineer of appellant, whose duty it was, among other things, to look after the engine rooms of appellant's and particularly in and about the place said appellee was injured.

At that time Studdert, in addition to being Port Engineer, one of whose duties was to hire the employees of appellant, was running an employment office, and it was at said employment office appellee was hired and charged a fee by Studdert for the job. Page 162.) He made no particular investigation as to Nordstrom's qualifications for the work (page 167) and, no doubt, was more interested in the fee he was to get from Nordstrom for hiring him than to see that appellee was experienced in the duties of fireman or instructing him as to his duties.

Appellee continued to work for appellant on the Argo as fireman and oiler until the evening of November 22d, 1910, when on the return trip from Richmond Beach near Seattle and while he was oiling the machinery, he slipped, his left leg going against the lower part of the guard between the passageway and the crank pit. The bottom of the guard being unfastened gave way, allowing his foot to go into the crank pit. He attempted to withdraw his foot but the guard cut into it and held it there until the engine was stopped, when by pressing with his right foot against the bottom

of the guard, he succeeded in releasing his left foot and pulled it out.

When his foot went into the crank pit it was struck by the revolving cranks and because of the fact that it was held by the guard pressing against it, was pulled further under the revolving cranks, was smashed and crushed so badly that after an unsuccessful effort of seven or eight weeks to save it, the foot and part of the leg had to be amputated.

This guard was about sixteenth or eighteenth inch sheet iron and separated the passage way from the crank pit. It was ordered put there about four years before by one Chesley, who was then manager of appellant and who continued to be manager until sometime in August preceding the injury to Nordstrom. It was put there as a guard for the protection of the employees using the passageway, to prevent them from slipping into the crank pit.

This guard was on the inside of the column, that is, the side toward the crank pit and revolving cranks, was fastened at the top to the standards by "U" bolts but was unfastened at the bottom. Immediately after the injury to Nordstrom, the guard was changed by the Port Engineer to the outside of the column, was bolted at the top and fastened at the bottom and has been in that condition ever since.

In April, 1911, an action at law was commenced in the Superior Court of the State of Wash-

ington for King County by the appellee against the Pacific Tow Boat Company for damages for the injury received, issues were joined and the cause was set down for trial for November 9th, 1911. On November 6th, 1911, the Pacific Tow Boat Company filed its petition in the District Court for limitation of liability and an order was entered restraining Nordstrom from proceeding with the trial in the state court and monition issued. The vessel was appraised at \$5,000.00, but after exceptions were taken to the appraisal, a stipulation was entered into, stipulating that the value of the vessel was \$8,000.00. Appellee filed his claim and answered the petition, testimony was taken and final hearing was had November 29th, 1912, briefs were submitted, after argument, and the matter was taken under advisement by the District Judge. On March 1st, 1913, memorandum decision was filed and on March 3d, 1913, final decree was entered and filed.

POINTS AND AUTHORITIES.

This guard was constructed at the direction of the manager of appellant for the safety of the employees, including the fireman using the passageway around the engine.

Apostles, pp. 57-58-59-67.

A good and sufficient guard was necessary in order to protect the employees using the passageway from falling or slipping into the crank pit.

Brownfield, pp. 49-50.

Chesley, pp. 57-58.

Ossinger, pp. 95-96.

Wright, p. 106.

Appellant's expert witnesses admitted that it would be safer for the men if a proper guard was there.

Lovejoy, p. 182.

Ramwell, p. 191.

Primrose, p. 222.

This guard was defective because it was placed on the inside of the columns, that is the side toward the crank pit instead of the outside, and was not fastened or secured at the bottom.

Brownfield, p. 35.

Studdert, pp. 156-166-167.

Second, because it was of too light material.

Studdert, p. 156.

Anderson, pp. 201-202.

Primrose, pp. 216-221.

This guard had remained in the same defective condition for about four years prior to the accident.

Studdert testified that he had been port engineer about three years at the time of the accident and it had not been moved during that time; when he went to work for the company he inspected this guard (p. 154), and it was in identically the same condition when appellee was hurt as it was ever since the vessel was built (pp. 163-167); that it had never been moved prior to the accident (p. 167) but he did change it shortly after the accident to the outside of the columns and fastened the

bottom down by a board (p. 158).

Appellee did not know of the defective condition of the guard (pp. 88-93) and the defective condition was not so apparent that he was bound to know of it and therefore assume the risk (p. 38).

The vessel and its owner are liable to appellee in damages on account of failure of those representing the vessel to exercise reasonable care to make said guard safe. The law has been definitely settled by the Supreme Court of the United States in "The Osceola," 189 U. S. 158; 47 Law Ed. 760, where it is stated:

"Upon a full review, however, of all English and American authorities upon these questions, we think the law may be considered as settled upon the following proposition: * * * That the vessel and her owner are both by English and American law liable to an indemnity for injuries received by seamen in consequence of unseaworthiness of ship or a failure to supply and keep in order the proper appliances appurtenant to the ship."

We could cite a great number of cases as to the duty of the master to furnish a safe place and safe appliances and by proper inspection to see that they are kept safe, but this court has decided the law on these points in so many instances that we only call the court's attention to one of its latest decisions, *Alaska Pacific Company vs. Egan*, 202 Fed. 867.

ARGUMENT.

There are no principles of law more firmly established than that it is the master's duty to furnish his servant a safe place within which to work; to furnish safe and proper appliances and by proper inspection see that they are kept safe, and he cannot delegate these duties to some one else and thereby relieve himself from liability for their non-performance or negligent performance.

In the case at bar, the master acting through its manager recognizing that the safety of the men using the passageway required a proper and sufficient guard between the passageway and the crank pit delegated the duty of installing such a guard to its servants. An insufficient guard improperly installed was the result and appellee was injured thereby. We submit that this renders appellant liable. Furthermore, appellant delegated the duty of inspecting the engine room and appurtenances which included this guard and remedying any defect in either to its servant, the Port Engineer, and a reading of his evidence shows that he was negligent in the performance of this duty for one of two things must be true. Either he did discover the defective condition of the guard and failed to remedy it as his testimony shows, or he did not discover it when by the exercise of reasonable diligence he could have discovered. In either case his negligence is the negligence of the master and renders it liable.

Appellant in the trial in the District Court attempted to rely on the defense that this guard was installed as such guards are usually installed on Puget Sound and therefore even if not proper it was not liable. In answer to this we wish to call the court's attention to the fact that in no single instance was it proven that such a guard as this, placed on the inside of the columns unfastened at the bottom, is in use on any boat on the Sound. The testimony of appellant's witnesses showed that when a guard is placed on the inside of the columns it is fastened both at the top and bottom. It is true that some of appellant's witnesses testified that in one or two instances they had seen boats with no guards at all. Even if this were a fact, would that establish a custom, or if it did, would the fact that one or a dozen tow boat owners were guilty of negligence in this particular relieve appellant when it knew and recognized that the safety of the men required a good and sufficient guard there but did not see that such a guard was properly installed and maintained? We think not. Negligent performance of a duty will never establish a custom.

In appellant's brief, however, this defense has in a measure been abandoned and it now urges on page 14 of its brief that this guard was all right; that "the most that can be truthfully said in condemnation of the guard in question is that it was not fastened at its bottom edge or that it was misplaced by being inside instead of the outside of

the columns," and that this was negligence of the officers in charge of the boat and no liability attaches to the vessel or its owners. We do not see how appellant can honestly take this position in the face of the testimony of its own witnesses by whose evidence it is certainly bound. Ramwell testified, "He didn't think it was intended as a guard because if he wanted to keep somebody from falling in he would put something stronger there for a guard" (p. 193), and Anderson said, "if it was put there as a guard it would be a foolish thing to have there because it was too light" (pp. 201-202), and Primrose, who swore he would not consider it a guard because it was not heavy enough ((pp. 219-220), and "if it was put there as a guard a man did not know his business in putting it there" (p. 221).

In this connection appellant likens it to a hatch cover leading the court to believe that it was removed and replaced daily. This is not true for the testimony shows of but one single instance when this guard was removed and that was after the accident when Studdert, port engineer, changed it from the inside to the outside of the columns and fastened it at the bottom with a board.

By the way, he does not give his reason for making the change then, but certainly not because it would better serve its purpose as a "splash guard," for he, together with all other of appellant's witnesses, swore that a splash guard should be on the inside of the columns and not the outside,

particularly on the Argo.

The evidence further shows that when appellee's foot went against the guard, the bottom being unfastened gave way allowing his foot to go into the crank pit where it was struck by the revolving cranks. On attempting to withdraw it the guard cut into his leg preventing its withdrawal while the cranks striking it pulled it in further and further, smashing and crushing it inch by inch nearly to the knee. The only way he got it out was by stopping the engine and pressing the bottom of the guard with the other foot thereby releasing it. We submit that the District Court was right when it stated that it was a "trap."

At this time we desire to call the court's attention to appellant's brief in two or three particulars which we believe are unworthy of its distinguished author. On page six of said brief it is stated that, "It is a physical impossibility for the injury to have happened in the manner described by him (appellee) and his testimony being unbelievable, there is no evidence to support a decree in his favor." This is the first time either in the evidence or in the oral argument at the final hearing that a doubt has been intimated as to the truthfulness of appellee's evidence. There never was any question in the minds of those upon the boat that it happened just the way appellee said it did. We ask this court to read his evidence carefully and see if there is one place in it that raises the court's suspicion as to its truthfulness. Being of foreign

birth and not having been in this country long enough to learn the language, appellee is not a fluent talker but neither on direct or cross examination does he attempt to evade any question. His testimony is clear and convincing. Proctor for appellant says that it is a physical impossibility for the accident to have happened in the way appellee testified that it did, but gives no explanation why it is a physical impossibility, neither does he attempt to state how it could have happened in any other manner than that related by appellee. Surely among the array of witnesses for the appellant, anxious as they were to testify in its behalf, there was one with mind sufficiently brilliant to have discovered that it was a physical impossibility for it to have so happened.

On pages 8 and 9 of appellant's brief the District Judge is accused of not understanding the engine or equipment of the engine room and accepting conclusions of witnesses that there was a defect notwithstanding an overwhelming preponderance of contradicting evidence. Then follows an exaggerated picture of a fantastic flap that proctor for appellant thought probably existed in the imagination of the District Judge upon which he based his decision. What is there about this engine room and guard that would make it difficult for the District Judge to understand it from a reading of the evidence and where is the overwhelming preponderance of contradicting evidence? A reading of the testimony discloses that

the evidence does describe the engine and equipment of the engine room and does point out the defects in the guard explicitly.

On page 12 of said brief fault is found with appellee's witness, Brownfield, because he did not report the defective guard and for that reason his evidence should not be considered but the evidence of Studdert, port engineer, who as proprietor of the Eagle employment office, took a fee from appellee for giving him a job, who knew of the guard's defective condition for three years and whose duty it was to remedy it, but who neglected to do so is quoted with approval by appellant in many instances.

If Chesley, former manager of appellant, at whose direction this guard was installed, is a "stultified" witness as said on page 14 of appellant's brief, how about McNealy, manager of appellant at the time appellee was injured who took Chesley's place and who "didn't really know whose duty it was to see that the engine room was safe" (p. 125), who "did not know whether there was a guard around the crank pit or not or whether there was one there now" (p. 127), and who "depended upon the government inspector to find out whether there is anything wrong with the boat." Mr. Chesley told the truth as a reading of his testimony will show. The company that he is interested in owns \$80,000.00 worth of the stock out of a capital of \$125,000.00, and he will have to bear a greater portion of the judgment than any of ap-

pellant's witnesses.

However, we can overlook the proctor for appellant in his attempt to bolster up a weak case by saying that the testimony of appellee is "unbelievable," that Chesley is a "stultified" witness, that Brownfield's evidence lacks "probative force," that the District Judge did not know what he was talking about, but we cannot overlook one fact, and that in the attempt to prejudice this court he has included in his brief a distorted photograph of what purports to be the engine room of the *Argo* but which shows the floor not to be horizontal and the man leaning back in an unnatural position, a photograph not offered nor received in evidence and not a part of the record in this case. We do not believe this court will consider the same and will not commend the manner in which it is sought to be brought before it.

In considering the amount of damages allowed instead of being too great we urge that it is too small. Appellee was 20 years of age when injured, a bright, active boy earning good wages. His leg was so smashed and bruised that though the doctor tried from the date of the accident to February following to save it he could not but had to amputate it. After the amputation appellee was on the operating table four or five times and that he suffered a great deal of pain (pp., 76-77) ; he was in the hospital altogether nearly eight months (p., 82) and at the time of giving his first testimony about fourteen months after the accident he was

still unable to work, and suffered a great deal (p., 83), and at the last time he testified which was nearly two years after the accident he was still unable to wear a wooden leg but had to use crutches (p., 208). There is no contributory negligence charged or proven to reduce the amount of damages and there are no facts favorable to the appellant tending to mitigate the damages. The expense for medical attention and hospital charges has been borne by the United States or by appellee.

The District Court realizing that he could not wholly compensate Nordstrom for the loss he had sustained, for the pain and suffering that he has undergone and will undergo allowed him \$5,000.00 with interest from date of the accident. It is our understanding of the law that when limitation of liability is allowed it dates back to the time of the accident and all claims are allowed as of and bear interest from that date. It would be unfair to do otherwise. Petitioner in this case waited for nearly a year after the accident before filing its petition and eight months after suit was commenced in the state court. The date of trial was only two days off, witnesses had been subpoenaed and the case had been fully prepared for trial. Interest was allowed as part of the claim. The District Court might have computed the interest and added the same to the five thousand dollars making one sum allowed. No fault could then have been found with it. Appellant did not call the District Court's attention to its error in allowing interest

and thus give it a chance to correct it if error was committed. This court has power to increase the amount of damages allowed and we respectfully ask this court if interest be disallowed that a sufficient sum be added to the damages to equal it.

Respectfully submitted,

WALTER S. FULTON,

CALVIN S. HALL,

HOWARD G. COSGROVE,

Proctors for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN COMMERCIAL COMPANY and
NORTHERN NAVIGATION COMPANY,
Plaintiffs in Error and Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant in Error and Appellee.

Transcript of Record.

Upon Writ of Error to and Upon Appeal from the
United States District Court of the Territory
of Alaska, Fourth Division

FILED

AUG 25 1913

No. 2293

United States
Circuit Court of Appeals

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vs.

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of Alaska, Fourth Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Title of Court and Cause.]

Names and Addresses of Attorneys of Record.

JAMES J. CROSSLEY, Attorney for Defendants
in Error and Appellees, Fairbanks, Alaska.

McGOWAN & CLARK, Attorneys for Plaintiffs in
Error and Appellants, Fairbanks, Alaska. [1*]

*In the District Court for the Territory of Alaska, 4
Division.*

No. 612.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

NORTHERN COMMERCIAL COMPANY &
NORTHERN NAVIGATION COMPANY,
Defendants.

Praeceptum for Transcript.

To C. C. Page, Clerk of the Above-named Court:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California, under the writ of error and appeal heretofore perfected to said Court, including all papers both on writ of error and on appeal in but one record, in accordance with the order of the above named Court of 24 May, 1913, and will include in said transcript the following papers, to wit:

*Page-number appearing at foot of page of original certified Record.

- (1) Statement of facts and stipulation for submission without action, filed 27 October, 1906;
- (2) Order concerning jurisdiction of controversy and staying proceedings, filed 27 October, 1906;
- (3) Judgment on report of Referee, filed 5 June, 1912;
- (4) Bill of Exceptions, settled 9 December, 1912;
- (5) Petition for Writ of Error, filed 20 May, 1913;
- (6) Petition for appeal, filed 20 May, 1913;
- (7) Assignment of errors to be used both on writ of error and direct appeal and both, filed 20 May, 1913;
- (8) Order allowing writ of error and fixing bond, filed 20 May, 1913;
- (9) Order allowing appeal and fixing amount of appeal bond, filed 20 May, 1913;
- (10) Order relative to supersedeas bond on writ of error, filed 20 May, 1913;
- (11) Bond on appeal and supersedeas, filed 20 May, 1913;
- (12) Designation of place for hearing of writ of error and appeal, filed 24 May, 1913; [3]
- (13) Writ of error, dated 19 May, 1913;
- (14) Citation on writ of error, dated 19 May, 1913;
- (15) Citation on appeal, dated 19 May, 1913;
- (16) Order extending time within which to perfect appeal, filed 24 May, 1913;
- (17) Praecipe for transcript;
- (18) Stipulation relative to printing record;
- (19) Stipulation as to tonnage tax on barges;

This transcript to be prepared as required by law, the orders and rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of said United States Circuit Court of Appeals for the Ninth Circuit, on or before the first day of August, 1913, pursuant to the order of this Court of 24 May, 1913, extending time and ordering but one record.

McGOWAN & CLARK,
Attorneys for Defendants.

Stipulation Relative to Printing Record.

Due service of the foregoing praecipe is admitted and it is hereby stipulated that the papers and records enumerated therein shall constitute the record to be used on the hearing both of the writ of error and of the appeal direct in the above-entitled cause; that the same may be printed in one record; and that, in the printing of said record for the consideration of the said Circuit Court of Appeals for the Ninth Circuit on writ of error and appeal direct, the title of the court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted, in the place of said title in all papers, in all other parts of said record, the words "Title of Court and Cause." [4]

Dated at Fairbanks, Alaska, this second day of June, A. D. 1913.

JAMES J. CROSSLEY,
United States Attorney,
Attorney for Plaintiff.
McGOWAN & CLARK,
Attorneys for Defendants.

IV.

That during all of the times herein mentioned, the said defendant has been carrying on a transportation business on the Yukon River and its tributaries, both in the District of Alaska and Yukon Territory, Canada, and during the year 1905, operated the steamers "Sarah," "Louise," "Susie," "Seattle No. 3," "Rock Island," "Tanana," "Lavelle Young" and "Leah" in the waters of the Yukon River in the District of Alaska and in the Yukon Territory, Canada, and said steamers were not operated wholly within the District of Alaska.

V.

That during the season of 1906, the said defendant operated the steamers "Sarah," "Hannah," "Seattle No. 3," "Tanana," "Lavelle Young" and "Ida May" on the waters of the Yukon River, in the District of Alaska, and in the Yukon Territory, Canada, [7] said steamers were not operated wholly within the District of Alaska.

VI.

That during the years aforesaid, the said Company operated the steamers "Margaret," "Delta," "Isabelle" and "R. D. Campbell" on the Yukon River and its tributaries, and in the Bering Sea at points between St. Michael and Fairbanks, Alaska, and procured thereon the licenses required by Section 460 of the Code of Civil Procedure of the District of Alaska hereinbefore mentioned.

VII.

That the steamers hereinbefore mentioned in paragraphs Four and Five, and operated in Canadian

waters as aforesaid, were compelled to, and did, pay a tonnage tax of eight cents per ton on their gross tonnage to the Collector of Customs in the city of Dawson, Yukon Territory, Canada.

VIII.

That a controversy has arisen between the parties hereto as to the construction of Section 460 aforesaid, the defendant contending that it should not be compelled to pay a license of \$1.00 per ton per annum on net tonnage, Custom-house measurement on such of its said vessels as were operated on the waters of the Yukon River in Alaska and on the waters of the Yukon River, Yukon Territory, Canada.

IX.

The defendant contends that it should not be required to pay a license of \$1.00 per ton on any of the river steamboats operated by it, whether operated wholly on the waters of Alaska, or elsewhere.

X.

The District Attorney representing the United States of America, in the Third Judicial Division of the District of [8] Alaska, is in doubt as to the correctness of the contentions made by defendant, and admits that he is in doubt as to the proper construction of the aforesaid section, and therefore consents that the same may be submitted to the Court for construction.

XI.

That it is consented by the parties hereto that the Court may consider as a part of this statement, either the originals or certified copies of the registers of all vessels owned or operated by the defendant; the

originals or certified copies of all licenses or receipts for tonnage taxes or tonnage licenses, paid by defendant to the Customs Collectors or Officials authorized to collect the same, either in the District of Alaska, the States or Territories of the United States, and in the Dominion of Canada. And such other records as may from time to time hereafter be submitted to the Court in connection with this controversy, by consent of the parties hereto.

XII.

That it is stipulated and agreed by the defendant that it shall, as soon as possible, procure the originals or certified copies hereinbefore mentioned, and shall file the same as exhibits in connection with this statement.

XIII.

That it is further stipulated by the parties hereto, that this statement may be amended from time to time either at or before the final argument before the Court, so as to set out fully all the facts necessary to enable the Court to determine the matters in controversy.

XIV.

That it is stipulated by the District Attorney aforesaid, for and on behalf of the plaintiff, that if the Court shall determine that the defendant should have paid the licenses as aforesaid, or any of them, the defendant within five days after the final judgment in this matter, shall pay in to the Clerk [9] of this Court, the amount that it should have paid in the first instance under the section aforesaid, as a license fee, and shall pay any costs of said proceed-

ings, and that it shall be exonerated from payment of any further penalties or fines under the provisions of the Code aforesaid.

XV.

That it is stipulated by the parties hereto that there has been no endeavor on the part of the defendant to avoid payment of the licenses aforesaid if defendant is lawfully chargeable therewith, and in that connection defendant expressly avers that it is acting in good faith in this connection and stands ready and willing at any time upon request of the District Attorney to pay into the court within three days after such request, a sufficient sum of money to cover all licenses that it may be determined that it is properly chargeable with, and such further amount as will cover the costs of these proceedings, or to give such bonds therefor as shall be satisfactory to the District Attorney, or to the Court.

XVI.

It is stipulated and agreed by parties hereto that this controversy is real and that these proceedings are taken in good faith to determine the rights of the parties, and that by reason of these proceedings the defendant shall in no wise be prejudiced.

XVII.

WHEREFORE, the parties hereto do hereby submit the foregoing to the above court for its decision without action, in accordance with the provisions of Chapter 28 of the Code of Civil Procedure of the District of Alaska.

Dated, Fairbanks, Alaska, this 26 day of October,
A. D. 1906.

NATHAN V. HARLAN,
District Attorney in and for the Third Division, Dis-
trict of Alaska,

Attorney for Plaintiff.

McGOWAN & CLARK,

Attorneys for Defendant. [10]

United States of America,
District of Alaska,—ss.

Volney Richmond, being first duly sworn, deposes and says: That the defendant is a private corporation. That I am the resident agent for the defendant above named and am the person upon whom summons should be served in an action against said defendant. That the controversy set forth in the foregoing petition is real and these proceedings are taken in good faith to determine the rights of the parties therein.

VOLNEY RICHMOND.

Subscribed and sworn to before me this 26th day
of October, 1906.

[Seal]

JOHN A. CLARK,

Notary Public in and for the District of Alaska.

United States of America,
District of Alaska,—ss.

N. V. Harlan, being first duly sworn, deposes and says: I am the United States District Attorney for the Third Judicial Division of the District of Alaska. That the United States is a party to the foregoing controversy; that the controversy set forth in the

foregoing petition is real and that these proceedings are instituted in good faith to determine the rights of the parties therein.

NATHAN V. HARLAN.

Subscribed and sworn to before me this 26th day of October, A. D. 1906.

[Seal]

JOHN A. CLARK,

Notary Public in and for the District of Alaska.

[Endorsed]: No. 612. United States District Court, District of Alaska, Third Division. United States of America, Plaintiff, vs. Northern Commercial Co., a Corporation, Defendant. Statement of Facts and Stipulation for Submission Without Action. Filed in the District Court, Territory of Alaska, 3d Division, Oct. 27, 1906. E. J. Stier, Clerk. [11]

.

[Title of Court and Cause.]

**Order [Directing Filing of Statement of Facts,
During Proceedings, etc.].**

It appearing to the satisfaction of the Court from the Statement of Facts and Stipulation entered into by and between the above named parties, that a question in controversy, which might be the subject of an action in a Court of Record, exists between said parties, and that a proper case exists for the submission of such question to the determination of this Court; and upon motion of N. V. Harlan, Esq., United States Attorney for the Third Judicial Division, District of Alaska, attorney for plaintiff, and who is acting in this matter under advice received

propelled by mechanical power; and an order having been subsequently made by this Court that the defendant, Northern Navigation Company, be made a party defendant to this action and its name inserted as a party defendant in all proceedings herein theretofore as well as thereafter had, and that all proceedings theretofore had to apply to and cover said Northern Navigation Company the same as though it had been an original party to such proceedings, and that there should be reserved to it all rights, objections and exceptions taken at any time in this proceeding by its codefendant, Northern Commercial Company, and that all testimony and evidence introduced and produced at the trial of this action before the Judges of this Court or the Referee appointed thereby, be considered as taken on behalf of said Northern Navigation Company, and that in the said Referee's report, if he should find any such license fee or tax to be due from either of said defendants, or from both of them, he would also find the amount due from each of them [14] respectively, and that judgment should be rendered in this action against each defendant for the amount found by said Referee to be due from such defendant; and the said Referee having been attended by the respective parties and their counsel and having taken testimony as to the amount due from each of said defendants by reason of the license fee or tax upon the steamers of each of said defendants registered in Alaska and propelled by mechanical power for the years 1905 to 1911, inclusive, and having heretofore on the 16th day of May, 1912, filed

his report in writing, in which report it appears that there is due from the Northern Commercial Company, a corporation, the sum of Five Thousand Ninety Dollars (\$5090.00) for such license fee or tax on such steamers operated by it during said years, and that there is due from the defendant, Northern Navigation Company, a corporation, the sum of Twelve Thousand Three Hundred Eight-four Dollars (\$12,384.00), for such license fee or tax upon such steamers operated by it during said years, which report of said Referee contains findings of fact and conclusions of law which, by consent of counsel for the respective parties hereto, may be used by the Court as its and in lieu of findings of fact and conclusions of law of this Court, the defendants reserving an exception as to substance, but waiving objection as to the form thereof, and the above-named defendants having made a motion to set aside and having filed objections and exceptions to the said report of said Referee, or certain parts thereof, which motion, objections and exceptions have been heretofore overruled by the Court, to which ruling defendants excepted, which exception is hereby allowed.

NOW, THEREFORE, on motion of counsel for plaintiff, It is ordered, adjudged and decreed that the said report of the Referee, including the aforesaid findings of fact and conclusions of law, be in all respects approved and confirmed.

It is further ordered, adjudged and decreed that the above named plaintiff, the United States of America, do have and [15] recover of and from the defendant, Northern Commercial Company, a

corporation, the sum of \$5,090.00.

It is further ordered, adjudged and decreed that the above named plaintiff, the United States of America, do have and recover of and from the defendant, Northern Navigation Company, a corporation, the sum of \$12,384.00.

It is further ordered, adjudged and decreed that the above named plaintiff, the United States of America, do have and recover of and from the defendants, Northern Commercial Company, a corporation, and Northern Navigation Company, a corporation, its costs and disbursements incurred in this proceeding to be taxed by the Clerk of this Court, the same to be apportioned between the two defendants above named in the proportion of the amount in which judgment is hereby rendered against each of them respectively.

Done in open court this 5th day of June, 1912.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 12, page 51.

[Endorsed]: Original. No. 612. In the District Court of the United States for the Territory of Alaska. United States of America, vs. Northern Commercial Co. and Northern Navigation Co. Judgment on Report of Referee. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 5, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [16]

[Title of Court and Cause]

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on duly and regularly to be heard on Saturday, the nineteenth day of August, A. D. one thousand nine hundred, and eleven, at Fairbanks Alaska, before the Honorable Peter D. Overfield, Judge of said Court, and the Honorable Edward E. Cushman, Judge of the District Court of the Territory of Alaska, Third Division; the Government being represented by the Honorable James J. Crossley, United States Attorney for the Fourth Division of Alaska, and the Honorable John Knox Brown, Assistant United States Attorney for said Fourth Division; the defendant company being represented by its attorneys and counsel, Messrs. McGowan & Clark. Whereupon the following proceedings were had and testimony was taken: [17]

[Proceedings Had August 19, 1911.]

Mr. CROSSLEY.—In this case the stipulations filed are in the nature of a demurrer to the right of the Government to secure a license tax, and I do not know whether the Court will hold that the Government shall open and close or it is for the defendant to open the matter.

Judge CUSHMAN.—I think as you are making the demand, the Government seeking money it has not got, that you are entitled to the opening and close.

Mr. CROSSLEY.—I might suggest to the counsel for the defense that if they wish to prove any facts

in the matter, I presume the evidence should precede the argument we wish to make.

By the COURT.—I think any evidence should be put in now. I see, in some of these cases, that the company owning the vessels was to supply, within a certain length of time, certain papers.

Mr. McGOWAN.—We will take up 612 first, the United States versus The Northern Commercial Company, and in the following case, which is against the N. A. T. & T. Co., the stipulation provides that that case shall abide the result of the N. C. case, so I presume for the purpose of the record it will be understood that 612, United States versus Northern Commercial Company, be taken up at this time and that the case as far as the N. A. T. & T. Co. is concerned, be continued indefinitely pending the decision on this. In the event of an appeal, there is no use taking all the cases up; 612 is the first one.

By the COURT.—And 657?

Mr. McGOWAN.—Yes, sir. Now, with reference to 612, I spoke to Mr. Crossley this morning. We mention some twelve or fourteen steamers, and, for the purpose of getting the facts [18] before the court, it was my idea we could simply deposit the tonnage receipts for one of the boats; there is no use of encumbering the record, and I ask to amend the stipulation by adding the following to it:

“That in the event the court shall determine that the defendant shall pay tonnage tax or fee under the section hereinbefore mentioned, that thereupon a referee may be appointed by the

court to ascertain the amount of tonnage upon which said fee shall be paid.”

If the Court will refer to the original stipulation, it will notice that Paragraph 18, which is the last paragraph of the stipulation, is in blank, and that clause was inadvertently, at the time this stipulation was drawn, left out. Right after 18 it reads: “Wherefore the parties hereto do hereby submit the foregoing facts to the above court for its decision, etc.” That clause is in the other cases; I think you will find that in Section 14 in the warehouse cases.

Mr. CROSSLEY.—The word “facts” is written in after the word “foregoing”?

Mr. McGOWAN.—Yes, sir. It is further stipulated by the parties hereto that in the event that the above court should determine herein that defendant should pay the license fee aforesaid, that thereupon a referee may be appointed to ascertain the amount of tonnage upon which such fee should be paid, etc. That is in the other cases and has been left out of the stipulation, apparently inadvertently. If that is not put in at the present time the Court would have to go through all the steamboats and check up their tonnage fees. We do not desire to place the Court or clerk’s office to any inconvenience; we desire to supply all data. [19]

Mr. CROSSLEY.—We wish to ask counsel for defendants if they admit they paid no license in the Territory of Alaska on these steamboats—is that admitted in the stipulation?

Mr. McGOWAN.—Yes, sir; that is admitted. I think the questions you ask about the admissions are

contained in the statement of the controversy, Paragraph 7—

“That the steamers hereinbefore mentioned in Paragraphs 4 and 5 and operated in Canadian waters as aforesaid were compelled to and did pay a tonnage tax of eight cents per ton on their gross tonnage to the collector of customs in the City of Dawson, Yukon Territory, Canada.”

We will admit that the steamers in controversy in this action paid no tonnage tax or license fees under Section 460 during the years 1905 and '6 in Alaska.

Mr. CROSSLEY.—That is satisfactory.

Mr. McGOWAN.—I have the statutes of Canada—it is Section 37 of Chapter 46 that I wish to offer in evidence; do you admit the authenticity of this?

Mr. CROSSLEY.—I think we will admit the authenticity of this law, but we object to it as incompetent, irrelevant and immaterial in this case, since any tax imposed there would be immaterial as to any tax imposed here.

By the COURT.—You are simply offering that to show that the tax paid there was paid in pursuance of law?

Mr. McGOWAN.—Yes, sir.

Objection overruled. Exception allowed.

Mr. McGOWAN.—We offer in evidence, then, at this time, Orders in Council of the Imperial Government and Treaties Negotiated between Her Majesty, The Queen, & the Foreign Powers, printed at Ottawa by Samuel Edward Dawson, Law Printer (For Canada) to the Queen's Most Excellent Majesty, A. D. 1898, and the particular part we desire to offer in

evidence is Section 37 of Chapter 46, 61 Victoria, found upon page 200 of this volume, which reads as follows: [20]

[Defendant's Exhibit No. 1—Section 37 of Chapter 46, 61 Victoria.]

“Inspection Fees. Section 37. The owner or master of every steamboat in Canada shall pay yearly and every year a rate or duty fixed by the Governor in council and not exceeding ten cents for every ton gross which such steamboat measures, and the owner or master of every passenger steamboat exceeding 100 tons gross shall pay an inspection fee of eight dollars for each inspection made imperative by this Act, etc.”

The first part is all we desire to offer.

Mr. CROSSLEY.—To which we object as incompetent, irrelevant and immaterial, for the reason that this is a statute of a foreign country and has nothing to do with taxation in the Territory of Alaska.

Objection overruled and exception allowed. The portion of the section above read is admitted in evidence and marked Defendant's Exhibit Number 1 (Case No. 612).

Mr. McGOWAN.—We have the receipts here covering all the steamboats, but I will simply tender one for each year. This is for the steamer “Sarah” for 1905.

Mr. CROSSLEY.—As to those receipts, we admit the genuineness of them, but we object upon the same ground as we did to the statute of a foreign country, that they are incompetent, irrelevant and

immaterial, not either tending to prove or disprove whether the defendants should pay the tax in the Territory of Alaska.

By the COURT.—We do not mean to admit that they are controlling, but in order that everything may be before the Court, the objection will be overruled, and you will be allowed an exception.

Mr. McGOWAN.—(Reading:)

[Defendant's Exhibit No. 2—Steamboat Tonnage Dues.]

“STEAMBOAT TONNAGE DUES.

June 12, 1905.

Number—75

Port of—Dawson, Y. T.

Name of Steamer—Sarah. [21]

Master's Name—M. M. Looney.

Owner's Name—Northern Commercial Company.

Port of Registry—St. Michael, Alaska.

Gross tonnage—1211.

Registered Tonnage—728.

Dues, Year 1905—1211 tons at 8 Cts.....\$96.88

Inspection Fee..... 8.00

\$104.88

Date of last payment—11th of June, 1904.

Place of last payment—Dawson, Y. T.

Canada, Yukon Territory,

Office Collector of Customs, Port of Dawson. To

Wit:

The foregoing is a true and correct copy of entry in books of this office showing the tonnage dues paid,

the same being the stub of receipt issued from this office.

Dated July 8, 1909.

J. H. McLEOD,

For Acting Collector of Customs Dawson, Y. T."

Stamped with the official customs seal, which reads:

"Seal

The Customs—Canada

July 8, 1909

Dawson, Y. T."

Mr. CROSSLEY.—To which we make the same objection.

Objection overruled and plaintiff allowed an exception.

The above receipt is admitted in evidence and marked Defendant's Exhibit Number 2 (Case Number 612).

Mr. McGOWAN.—The next receipt we offer is the same except it is for the year 1906.

It is admitted under the same objection and exception and is marked Defendant's Exhibit Number 3 (Case No. 612) and reads as follows:

[Defendant's Exhibit No. 3—Case No. 612—Steam-boat Tonnage Dues.]

"STEAMBOAT TONNAGE DUES.

5th June, 1906.

Number— [22]

Port of—Dawson, Y. T.

Name of steamer—Sarah.

Master's Name—M. M. Looney.

Owner's Name—Northern Commercial Company.

24 *Northern Commercial Company et al.*

Port of Registry—St. Michael, Alaska.

Gross Tonnage—1211.

Registered Tonnage—728.

Dues, Year 1906—1211 tons at 8 Cts.—\$96.88

Inspection fee—

\$96.88

Date of last payment—June 12, 1905.

Place of last payment—Dawson, Y. T.

Canada, Yukon Territory,

Office, Collector of Customs, Port of Dawson. To
Wit:

The foregoing is a true and correct copy of entry in books of this office showing the tonnage dues paid, the same being the stub of receipt issued from this office.

Dated July 8, 1909.

J. H. McLEOD,

For Acting Collector of Customs, Dawson, Y. T.”

Stamped with the official customs Seal as follows:

“Seal

The Customs—Canada

July 8, 1909

Dawson, Y. T.”

Mr. McGOWAN.—Here is something I obtained under the suggestion of the former District Attorney. It is an analysis by a leading professor of California on this section—I don’t know whether it is admissible as evidence or not but if you have no objection we will let it go in for what it is worth.

Mr. CROSSLEY.—I don’t suppose I will object to counsel using it in argument but I do object to it

as incompetent, irrelevant and immaterial as evidence. [23]

Whereupon the grammatical analysis referred to was handed to the Court, counsel for defendant stating that it was in the nature of expert testimony. The Court announced that it would not be necessary for counsel to read the same, but that it would be considered with the testimony in the case. The said analysis was as follows, to wit:

[Analysis of Section 460, Criminal Code of Alaska.]

UNIVERSITY OF CALIFORNIA.

Department of English.

Berkeley, Nov. 27th, 1910.

William Thomas, Esq.,

San Francisco.

My dear Mr. Thomas:

In regard to Sec. 460 of the Criminal Code of the District of Alaska, I must premise by reminding you that the words "doing business wholly within the District of Alaska" are not the *predicate* of the sentence, but an adjective or participial phrase used as a modifier to restrict or qualify the scope of a noun. I say this because in your letter of Nov. 11th, you inadvertently speak of those words as a "predicate," and we might misunderstand each other.

Before entering upon the grammatical analysis of the passage in question I answer briefly your leading question as follows: You can not refer back the adjective phrase, "doing business wholly Alaska" to (1) vessels registered in Alaska, or to (2) those not paying license, etc., or with *grammatical* certainty even to (3) river and lake steamers.

The punctuation makes it refer exclusively to "transportation lines" immediately preceding it.

But the grammar and punctuation of the statute are in this and other respects so equivocal and obscure that I have reason to believe that your through boats from St. Michael to Dawson are not by the terms of the statute liable for the tonnage license;—as the following analysis may perhaps prove.

My general knowledge of the subject of customs, etc., leads me to surmise that the author of the statute intended by the first clause, sea-going lines whose home-port was in Alaska; by the second [24] clause, vessels or lines whose home-port was not in Alaska, which were registered elsewhere—say in San Francisco or Seattle—but were doing business with Alaska ports; by the third, lines and steamers plying wholly within Alaska. But I have laid aside any attempt to reconcile the author's intention with the possible ordinary categories, and have aimed to show, what I sincerely believe, that his grammar (his use of words and punctuation) is so careless or equivocal that the statute as drawn can not hold water.

If you want more authority for any specific statements, let me know.

I should have sent you this sooner, but since you did not answer my letter in which I doubted whether I could endorse your view of a certain phrase, I thought you had given me up.

Yours ever,

C. M. GAYLEY.

ANALYSIS.

Definitions:

“A predicate is the word or words which express what is affirmed or denied of the subject.” It includes a verb. (Century Dictionary.)

A group of words expressing a statement, command or question is called a sentence; a combination of subject and predicate. (Abbot, *How to Parse*, p. 153.—Century Dictionary, “Sentence.”)

“A sentence is *compound* if containing more than one subject or predicate or both.” (Century, “Sentence” 4.)

“A clause is one of the lesser sentences which united form a compound sentence.” (Century, “Clause” 3.)

“The members of a compound sentence are co-ordinate clauses.” (Century, “Clause” 3.)

The passage of Sec. 460 (Criminal Code, Alaska), beginning with the word “freight” and ending with the word “vessel,” is a compound sentence made up of three clauses intended to be co-ordinate, each of which consists of a noun or nouns, with modifiers, as *subject* and of a predicate in common,—the verb (contained in the preceding [25] paragraph, and understood in this) “shall pay” with its object and modifiers, “one dollar per ton vessel.”

The subject of the first clause is “freight and passenger transportation lines” modified by the adjective phrase (“A *phrase* is a group of words expressing a meaning but not a statement.” Abbott, *How to Parse*, p. 153.) “propelled by mechanical power registered in the district of Alaska.” (By the way,

I pause to ask here whether the statute means that the "lines" are registered, of "the mechanical power." It says the "power"; if it had meant to say the "lines" are registered, it ought to have had a comma after the word "power" (Lamont, English Composition, p. 278; Perry, Punctuation Primer, p. 16), so that the "lines" would be defined both by their propulsion and by their registering. As the statute reads, lines whose mechanical *power* is *not* registered do not have to pay tonnage.) The predicate is "shall pay," etc.

The second clause is introduced by the first "or" (of the ambiguity of which much will be said later) and consists of "freight and passenger . . . lines," understood from the former clause, with the modifying adjective phrase "not paying license or tax elsewhere." The predicate is "shall pay" etc.

The third clause is introduced by the "and" following "elsewhere," and consists of the subject "river and lake steamers, as well as transportation lines doing business wholly within the district of Alaska." The predicate is "shall pay," etc., as before.

Since the first and second of these subjects have the same noun in common, "freight . . . transportation lines," and are connected by the conjunction "or," which is equivocal in effect according as it implies or does not imply an alternative, I shall postpone their consideration and take them up together, after the subject of the third clause has been discussed.

The third clause is introduced by the copulative

or additive conjunction “and.” Its subject is two-fold, first—“river and lake [26] steamers” (terminated by a comma, as if segregating them from the second part of the subject, and to show that that second part is modified separately). (Lamont, p. 276; Perry, p. 18 (c).) and second—“transportation lines doing business wholly within the district of Alaska.” The adjective phrase “doing business Alaska” indubitably modifies the noun preceding it, “transportation lines,” and is restrictive of it and restricted to it because it is not separated from it by any mark of punctuation. In fact, the use of the conjunction “as well as” instead of the ordinary “and” would indicate the author’s intention of setting off the following transportation lines” with its special restrictive “doing business wholly in Alaska” as an independent subject complete in itself.

If there had been no comma after “steamers” the nouns italicized, “river and lake *steamers* as well as *transportation lines*” would by punctuation be modified—both of them—by the adjective phrase “doing business Alaska.” As the punctuation stands, the phrase “doing business Alaska” can be interpreted only logically or by implication to modify the “river and lake steamers.” Grammatically it does not. Still less can it be taken to modify more remote subjects preceding the adverb “elsewhere” and the additive conjunction “and.” In fact, as the statute reads, this punctuation makes all “river and lake steamers” whether “doing business wholly in Alaska” or not a subject of the predi-

cate "shall pay one dollar per ton," etc. And that, I presume is equivalent to stating that the drafter of the statute unintentionally reduced the law to absurdity.

If, on the other hand, there had been a comma after the words "as well as transportation lines," so that the clause ran "and river and lake steamers, as well as transportation lines. doing business wholly within the district of Alaska," that comma would have set off the adjective-phrase "doing business in Alaska" in such a way as that it would not modify *exclusively* the immediately preceding [27] "transportation lines" (Lamont, p. 278), but would or might modify and explain each of the preceding co-ordinate subject-nouns of the series; not only "river and lake steamers" but also the "freight and transportation lines" of the two clauses preceding the word "elsewhere."

Still, though the restrictive phrase "doing business wholly within Alaska" does not refer, by punctuation or grammatically, to any of the preceding subject-nouns before "as well as," it would appear that in grammatically specifying the payment of tonnage for "transportation lines doing business wholly in Alaska," the statute exempts, grammatically, such transportation lines as are doing business partly within and partly without the district from that payment, and that it logically identifies such lines with those whose existence is implied by the second clause above, viz., those which are paying license or tax elsewhere than in the district of Alaska.

Turning now to the clauses preceding the word "elsewhere," we note that the subject-noun of the first runs from the word "freight" to "lines," and is modified by the adjective-phrase "propelled by mechanical power registered in the district of Alaska." This subject noun has for its predicate "shall pay one dollar per ton," etc. But the subject-noun "freight-lines" is restricted grammatically to those "propelled by mechanical power registered in Alaska" not to those "propelled by mechanical power" which, in addition, happen to be "registered in Alaska," but to those exclusively whose *mechanical power is registered* in Alaska.

The subject-noun of the second clause is the same as that of the first "freight and lines," and is modified by the adjective or participle phrase "not paying license or tax elsewhere." This subject is connected with that of the former clause by the conjunction "or," and is also the subject of the predicate "shall pay" etc.

Now, these subjects of clauses 1 and 2, with their common predicate [28] may be construed grammatically (A) as co-ordinate clauses, i. e., "of equal rank or order" (Whitney, *Essentials Engl. Grammar*, 148), or in another way (B) of which I shall speak later.

The subjects of (1) and (2) are joined by the conjunction "or," which, if we regard the clauses as (A) *co-ordinate*, may be either (1) *disjunctive*, or (2) *expressive of equivalence*.

If A (1), *disjunctive*, the "or" implies an alternative (Whitney, p. 148) between the two clauses; that

one may be substituted for the other (Century Dictionary, "Or", I). The "or" co-ordinates two clauses, "each one of which in turn is regarded as excluding consideration of the other." (Century Dict. "or" Ia), In that case, grammatically, "freight and passenger lines Alaska" is one subject of the predicate "shall pay," etc., and "freight and passenger lines not paying license or tax elsewhere" is a distinct subject "excluding consideration of the other" (Century), viz., of those whose "mechanical power is registered in Alaska." That is to say, whether the author of this language meant so or not, the second clause excludes entirely the question of registration either of "lines" or of "mechanical power" only and states that lines paying license or tax elsewhere, are, by implication, not the subject of the predicate "shall pay one dollar per ton," etc.

If A (2), the "or" is *expressive of equivalence*, it is "a conjunction co-ordinateing two or more words or clauses each of which in turn is regarded as the equivalent of the other or others. Thus, we say of a particular diagram that it is a square *or* a figure with four equal sides and equal angles." (Century Dictionary, "Or" (b).) In that case the writer of the statute has said "these lines shall pay tonnage; freight and passenger lines, registered in Alaska, *or* (as equivalent of the meaning of the former clause) these lines that are not paying license, etc., elsewhere." So again the statute has, wittingly or not, provided by its grammatical construction that [29] the lines which "pay

license or tax elsewhere” shall be regarded as in the same category with those which are *not* registered, or whose mechanical power is *not* registered in Alaska; that is to say, in the category of those not subject to pay tonnage.

But there is still a further obscurity in the phraseology of the statute, owing to the unfortunate use of the word “or,”—that is

(B), *the equivocal effect of “or.”* Alexander Burrill in his Law Dictionary and Glossary of 1850 (see Worcester’s Dictionary, under “Or”) says “*Or*, in written instruments, is frequently construed to mean *and*, where such construction is necessary to effectuate the intention of the parties. It has been said that there is perhaps no word in the language of more equivocal effect than *or*. Hence in England it has been excluded from indictments, though it has been admitted in American practice.” With this interpretation of the drafter’s intention the clauses as written may mean “lines registered in, or mechanical power registered in Alaska, *and* not paying license elsewhere.” In that case since the “*and*” may convey the illative force of “consequently,” or the conditional force of “provided,” the writer of the statute has by his grammatical construction, exempted from the force of the predicate “shall pay” lines registered, or whose mechanical power is registered, in Alaska, which are already paying license or tax elsewhere.

C. M. GAYLEY. [30]

Now, I would like to ask counsel for defendant if they are willing to admit at this time that all the

business their steamboats do, that is, connected with this case, is done on the Yukon and its tributaries below Dawson and that the greater part of their business is done upon the rivers rather than in Yukon Territory.

Mr. McGOWAN.—That is correct, we will admit that we touch at two ports in the Yukon Territory, carrying freight to two ports, Forty Mile and Dawson.

Mr. CROSSLEY.—That is, all the business done by the company is done from St. Michaels and Nome on the Yukon and its tributaries in Alaska.

Mr. McGOWAN.—Yes, sir, with two terminuses, one being St. Michaels in Alaska and the other being Dawson in Yukon Territory.

By the COURT.—Are all these vessels registered at St. Michael?

Mr. McGOWAN.—Yes, sir.

Mr. CROSSLEY.—You will admit that all these vessels are registered at St. Michaels?

Mr. McGOWAN.—Yes, either St. Michaels or Eagle.

Mr. CROSSLEY.—All within the Territory of Alaska?

Mr. McGOWAN.—Yes, sir.

Mr. CROSSLEY.—Will you also admit that your company owning these boats pays no license or tax anywhere else in the United States on these boats?

Mr. McGOWAN.—We pay the general taxes, I presume, in the State of California on the assets of the entire corporation.

Mr. CROSSLEY.—But no license or tax, no spe-

cific license or tax upon the steamboats that are in issue in this case?

Mr. McGOWAN.—Yes, we also pay the United States Government—taking the Steamer “Sarah” for the year 1906—June 23, 1906, tonnage dues \$19.17; Government receipt Number 9501, attached [31] to original cash voucher Number 51 of June 23, 1906, on steamer “Sarah”; that is tonnage tax paid by the boat once a year at Eagle or St. Michaels.

Mr. CROSSLEY.—But no license or tax?

Mr. McGOWAN.—No, tonnage dues only—rail-road or tonnage dues.

Mr. CROSSLEY.—That is a uniform tax over the United States?

Mr. McGOWAN.—That is a uniform tax over the United States. They also pay that.

Mr. CROSSLEY.—But you do admit there is no other license or tax paid within the jurisdiction of the United States other than that?

Mr. McGOWAN.—Yes, sir. I have the voucher for this, showing we also paid that in 1906—that was paid in each year 1906 and 1905.

Mr. CROSSLEY.—What I want to get at is that no other tax or license fee was paid in any other state or territory of the United States.

Mr. McGOWAN.—That is correct.

Mr. CROSSLEY.—I understood Mr. McGowan to say that he wished to introduce some evidence on the wharfage matter, but that would be in the other case and I do not know of anything we care to introduce in this matter, since the real issues have been

admitted by the defendant and the Government respectively.

Evidence in Case Number 612 closed. [32]

That after said testimony was closed, argument was made by the counsel for the respective parties, after which the Court took the matter under advisement.

That thereafter, and on the 24th day of August, 1911, the Court, by consent of counsel for plaintiff and defendant, made and entered an order in the words and figures as follows, to wit: [33]

[Title of Court and Cause.]

Order [Directing Amendment of Statement of Facts, etc.].

The above-entitled action having come on for trial before the Court, and the Court having given its ruling upon the construction of the statute in controversy, whereby it ruled that the defendant is liable for the payment of the license or tonnage tax mentioned in the original Statement of Facts on file in this action and it appearing to the Court that this action had been pending since the year 1906, and that in the interim the defendant has not paid the said license or tonnage tax upon the steamboats operated by it during each year, and for the purpose of avoiding multiplicity of actions and settling all differences between the parties to this action, in relation to the controversy herein, and so that the rights of the respective parties may be fully adjudicated up to the year 1911—the defendant having announced that he intends to appeal from the ruling of this Court aforesaid—and for the purpose of having all matters in

controversy between said parties up to the present year made a part of the record herein, so that the same may be fully considered upon appeal, and the attorneys for the respective parties having consented to the making of this order,

IT IS HEREBY ORDERED

that the original Statement of Facts filed herein be amended and supplemented by adding thereto the amended and supplemental paragraphs hereunto annexed, marked respectively, "XVII" and "XVIII," and that said paragraphs shall be considered as a part and portion of the original statement of Facts filed in the above-entitled action. [34]

IT IS FURTHER ORDERED:

That said original Statement of Facts need not be engrossed and that the said paragraphs shall be considered as a part thereof, and the verification of the same need not be made, and that the Clerk of the Court shall attach the same, together with this order, to the original statement of facts filed in this action.

IT IS FURTHER ORDERED:

That the said Amended and Supplemental paragraphs be filed herein *nunc pro tunc* as of the 18th day of August, 1911.

EDWARD E. CUSHMAN,
PETER D. OVERFIELD,

Judge.

Dated Aug. 24, 1911.

Entered in Court Journal No. 11, page 396.

[Indorsed]: No. 612. (Title of Court and Cause.)
Order. Filed in the District Court Territory of

Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk.
By G. F. Gates, Deputy.

That attached to the foregoing Order is the following: [35]

[Title of Court and Cause.]

**Amendment to Statement of Facts and Supplemental
Statement of Facts.**

Insert on page six (6) of original Statement of Facts and Submission Without Action, after "XVII," the following:

"That in the event that the Court shall determine herein that the defendant shall pay any license tax or fee under the Section hereinbefore mentioned, that thereupon a Referee may be appointed by the Court to ascertain the amount of said license tax or fees and report the same to the Court; said report to be subject to review by the Court, the same as in other matters."

XVIII.

That since the filing of the original Statement of Facts in this action and during the years 1907, 1908, 1909, 1910 and 1911, defendant has been operating boats on the Yukon River in the same manner as set out in the original statement of facts herein, and in connection with these years it is consented that the Court in determining this action, shall determine whether or not the said defendant is liable to pay a license tax upon the steamboats operated by it during said years, and the amount thereof; that is to say, that the Court

shall have jurisdiction in the present action to determine the controversy between the parties plaintiff and defendant from the year 1905 down to and including the year. 1911.

Dated August 24, 1911.

McGOWAN & CLARK,
Attorneys for Defendant.

The foregoing Amendment and Order are hereby consented to.

JAMES J. CROSSLEY,
Attorney for Plaintiff,
McGOWAN & CLARK,
Attorneys for Defendant.

[Indorsed]: No. 612. Filed in the District Court, Territory of Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy, *nunc pro tunc* as of Aug. 18, 1911. [36]

That thereafter, and on the 24th day of August, 1911, the Court made and entered its interlocutory order, which was as follows:

[Title of Court and Cause.]

Order [That Northern Commercial Co. is Liable for License Tax; Directing Filing of Amended Statement of Agreed Facts, etc.].

This cause having come on for trial on the 19th day of August, 1911, before the Honorable Edward E. Cushman, Judge of the District Court for the Third Judicial Division of the Territory of Alaska, and the Honorable Peter D. Overfield, Judge of the District Court for the Fourth Division of the Territory of Alaska, the plaintiff appearing by James J.

Crossley, United States Attorney, and John K. Brown, Assistant United States Attorney, and defendant appearing by Messrs. McGowan & Clark, its attorneys, and a jury trial having been expressly waived by the respective parties hereto in open court, and the Court having heard all the evidence of the respective parties bearing upon the question of the liability of the defendant to pay a license tax to the plaintiff upon the net tonnage of its steamships, as provided by Section 460, of the Act of Congress entitled "An Act to define and punish crime in the District of Alaska and to provide a Code of Criminal Procedure for said District," approved March 3, 1899, as amended by Section 29, Title I of the Act of Congress entitled "An Act making further provision for a Civil Government for Alaska, and for other purposes," approved June 6, 1900; and the Court having on said [37] day ruled and held that the defendant is liable for the payment of such license tax, and it further appearing that it is advisable that all the matters of difference between the plaintiff and the defendant arising out of the nonpayment of said license tax for the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911, be adjudicated in this action, and that the agreed statement of facts herein be amended accordingly and filed *nunc pro tunc* as of the 18th day of August, 1911, and that further evidence will be necessary in order to show the amount of said license tax on the several steamships of defendant for the several years mentioned in said amended and agreed statement of facts herein, and that such further evidence herein may be taken be-

fore a referee and reported to this Court and James J. Crossley, Esq., United States Attorney for the Fourth Judicial Division of the Territory of Alaska, on behalf of the United States, and Messrs. McGowan & Clark, attorneys for the defendant and on behalf of the defendant, appearing this day in open court, and consenting and agreeing to the entry of this order and to each and every one of its terms and conditions, save and except that counsel for defendant objects to the ruling of the Court as to any liability on its part for any license tax whatever and excepts thereto;

NOW, THEREFORE, IT IS ORDERED that the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of \$1.00 per ton, per annum, for the years 1905 to 1911, both inclusive, on the net tonnage, custom house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power.

It is further ordered that an amended statement of agreed facts be filed herein *nunc pro tunc* as of the 18th day of August, 1911, containing a statement of the facts in controversy between [38] the parties hereto as to such license tax on the net tonnage of its steamships for the years 1905 to 1911, both inclusive, instead of for the years 1905 and 1906, and that when judgment shall be entered herein, such judgment shall be for the whole amount of said license tax for the years 1905 to 1911, both inclusive; and it is further ordered that Guy B. Erwin, Esq., an attorney of this Court, be and he is hereby ap-

pointed as Referee herein to take and report the above evidence and he is hereby ordered to proceed to hear proofs and take testimony as to any and all matters and things involving or respecting the amount of such license tax for said years, and that such Referee report said testimony to this Court on or before the 31st day of March, 1912, and that such Referee be paid for his compensation the sum of \$15.00 per day for each and every day necessarily spent by him in the performance of his duties as such Referee and \$7.50 a day for any fraction of a day so spent, besides \$1.00 per page for a transcript of the testimony, exclusive of any original exhibits thereto attached, and that such compensation shall become a part of the costs in this case and may be taxed by the prevailing party, if paid by it, against the losing party as a portion of its taxable costs and disbursements in this action.

It is further ordered that either of the Judges above named, or any Judge of the District Court of the Territory of Alaska, having or exercising jurisdiction within the Fourth Judicial Division of said Territory, may make, enter and sign any order hereafter made and entered in this cause or any judgment herein.

It is further ordered that this cause be and it is hereby continued for further hearing until after the filing by the above-named Referee of his report of the testimony taken by him herein, as herein provided, each of the parties hereto consenting and agreeing in open court that such continuance shall in nowise affect the jurisdiction of this Court to pro-

ceed further in the case [39] upon the coming in and filing of said Referee's report.

Done in open court this 24th day of August, 1911.

PETER D. OVERFIELD,

EDWARD E. CUSHMAN,

District Judges.

Entered in Court Journal No. 11, page 390.

[Indorsed]: No. 612. (Title of Court and Cause.)
Order. Filed in the District Court, Territory of
Alaska, 4th Div. Aug. 24, 1911. C. C. Page, Clerk.
By H. C. Green, Deputy.

To a portion of which interlocutory order and
judgment, defendants excepted and presented and
had allowed a Bill of Exceptions, which was in the
words and figures as follows: [40]

[Title of Court and Cause.]

Bill of Exceptions [To Order Filed August 24, 1911].

BE IT REMEMBERED: That on the 24th day
of August, 1911, during the trial of the above-en-
titled action the Court made and filed its order,
wherein it ruled that the defendant was liable for
such license fee, and ordered "that the defendant,
the Northern Commercial Company, a corporation,
is liable to pay to the United States a license tax of
\$1.00 per ton, per annum, for the years 1905 to 1911,
both inclusive, on the net tonnage, custom-house
measurement, of each of its freight and passenger
steamships registered in the District of Alaska and
propelled by mechanical power." To which ruling
and the part of said order above specified the de-
fendant then and there excepted, and does now except

to the same, and assign the same as error.

Dated August 24, 1911.

McGOWAN & CLARK,
Attorneys for Defendant.

ORDER.

The above exception is hereby allowed and the foregoing Bill of Exceptions is hereby settled and allowed.

Done in open court this 24th day of August, 1911.

PETER D. OVERFIELD,
EDWARD E. CUSHMAN,

Judges.

Entered in Court Journal No. 11, page 700. [41]

[Indorsed]: No. 612. (Title of Court and Cause.)
Bill of Exceptions. Filed in the District Court,
Territory of Alaska, 4th Div. Aug. 24, 1911. C. C.
Page, Clerk. By G. F. Gates, Deputy.

That thereafter such proceedings were had that the matter came on regularly for hearing before the Honorable Guy B. Erwin, Referee, appointed by this Court, on the 1st day of February, 1912, at the hour of 11 o'clock in the forenoon, at the office of said Referee in the Red Cross Building in the town of Fairbanks, pursuant to the notice of hearing issued and served on the attorneys for respective parties by the Referee on the 20th day of January, 1912; Honorable James J. Crossley, and the Honorable John K. Brown, appeared for the United States, and John A. Clark, Esq., appeared for the defendant; at which hearing, and subsequent hearings, the following proceedings were had and testimony was taken.

[Title of Court and Cause.]

Report of Procedure and Testimony Before Referee.

This matter came on before the referee on the 1st day of February, 1912, at the hour of 11 o'clock in the forenoon, at his office in the Red Cross Building, pursuant to the Notice of Hearing issued and served on attorneys for the parties by referee on the 20th day of January, J. J. Crossley and J. K. Brown, appearing for the United States, and John A. Clark appearing for the defendant.

Hearing continued upon motion of attorney for defendant until 2 P. M.

The parties appeared by their attorneys at 2 o'clock P. M. on the 1st day of February, and defendants filed a petition for continuance to the 20th day of February, 1912, at 2 o'clock P. M. Continuance granted until February 5th.

On February 5th, the parties by their respective attorneys aforesaid appeared, and at the request of attorneys for defendant the matter was continued until February 6th, 1912.

On February 6th, 1912, the parties appeared before the referee by their attorneys above named, and on motion of attorney for the defendant and by consent the matter was continued until the 20th day of February, 1912.

On February 20th, 1912, the matter was continued by consent of attorneys until March 15th, 1912.

On March 15th, 1912, the parties appeared by their attorneys aforesaid, and the following proceedings were had:

By Mr. CLARK.—We now offer for the inspection of the referee, and [43] to enable him to formulate his report subject to being properly sworn to by Mr. Richmond or Mr. McGowan, a tabulated list of all of the boats of the Northern Commerical Company and the Northern Navigation Company operating in waters of the interior of the Territory of Alaska for the years 1905 to 1911, inclusive, showing particularly the boats that were operated foreign, that is to say, operating between Yukon River points in Alaska and Yukon River points in Canadian Territory showing the net tonnage of each of said boats, and offer in support and as evidence of the tonnage of each of said boats the Government Compilation known as the Forty-second Annual List of Merchant Vessels of the United States, with official numbers and signal letters, etc., compiled under the authority and by the Department of Commerce and Labor in its Bureau of Navigation, and being for the year ending June 30th, 1910.

Mr. CROSSLEY.—To which we object as incompetent, irrelevant and immaterial, for the reason that the same is not properly identified or sworn to by witnesses competent to testify to the same, there being no witnesses to identify and swear to the same.

By REFEREE.—Tabulated list and book accepted for purpose offered.

By Mr. CLARK.—We offer in evidence certificate of the Clerk of the District Court for the Second Judicial Division at Nome, Alaska, showing the license paid by the Northern Commercial Company on boats for the years 1905 and 1906.

By Mr. CROSSLEY.—Objected to as not the best evidence.

By REFEREE.—Statement accepted.

Hearing continued to 22d March, 1912, at 2 o'clock P. M.

On 22d March, 1912, at request of defendant and by consent, hearing continued until March 25th, 1912, at 2 P. M. [44]

On 25th March hearing continued until April 1st, 1912, at 2 P. M., by consent of parties.

On April 1st, 1912, by agreement of counsel, hearing continued to await the arrival in Fairbanks of Volney Richmond, Superintendent of the defendant corporation, and Thomas A. McGowan, one of its attorneys.

On May 8th, 1912, at 2 o'clock P. M. the parties appeared before the referee, Mr. J. K. Brown appearing for plaintiff, and Mr. Thomas A. McGowan appearing for defendant, and the following proceedings were had:

[Testimony.]

[Testimony of Volney Richmond, for Defendant.]

Mr. VOLNEY RICHMOND being first duly sworn by the referee testified as follows:

(By Mr. McGOWAN.)

Q. Mr. Richmond, you are the Superintendent of the Northern Commercial Company? A. I am.

Q. Also the Northern Navigation Company?

A. I am.

Q. An official of both companies? A. I am.

Q. Will you look at this list which was formerly

(Testimony of Volney Richmond.)

submitted to the Referee, and state where that list was prepared?

A. In San Francisco. It was prepared at the home office of the Northern Commercial Company and Northern Navigation Company at San Francisco.

Q. That is the same statement prepared under the supervision of myself last winter? A. It is.

Q. Is it a correct statement as taken from the records? A. It is.

Mr. McGOWAN.—We now offer it in evidence.

By Mr. BROWN.—Q. All the steamers named in this list were operated by your company during the years designated on the statement?

A. They were.

Q. And those opposite the names of which are the words: "Operated to foreign ports" and the ditto characters, were [45] those upon which no license was paid? A. They are.

Q. These are all the boats that your records show were operated by the companies in the years 1905 to 1911, inclusive? A. They are.

Q. The statement of the net tonnage shows the current net tonnage according to the certificates of registration of the respective steamers? A. Yes, sir.

Q. Have you compared this statement with the official list? A. I have not.

Q. You say there were no other steamers than shown on this list operated by the Northern Commercial Company and the Northern Navigation Company between the years 1905 and 1911 in Alaskan

(Testimony of Volney Richmond.)

waters? A. There were not.

Q. And you are satisfied that this is a correct transcript of your books? A. I am.

Q. Especially as to dates and amounts paid for licenses for different steamers? A. Yes, sir.

Mr. McGOWAN.—We offer this as “Defendant’s Referee Exhibit No. 1.”

(Statement admitted and so marked by referee.)

The following is Defendant’s Referee Exhibit No. 1: [45a]

ated and Tonnage Licenses Paid.]

RECORD OF NORTHERN NAVIGATION STEAMERS OPERATED AND TONNAGE LICENSES PAID.

Sea- son.	Steamer.	Regis- ter Number.	Net Ton- nage.	Licenses At.	Date.	Taken. Expiring.	Amount Paid.	Remarks.
1905	Herman	96398	164	Nome	Jul. 22 '05	May 31 '06	164.00	Operated to foreign ports -do- " " " " " " " "
	Ida May	111182	267	"	Oct. 16 '05	June 28 '06	267.00	
	Delta	202463	237	"	Jul. 22 '05	Jul. 18 '06	237.00	
	D. R. Campbell	157509	409	"	Oct. 16 '05	Sept. 7 '06	409.00	
	Margaret	92890	260	"	Jul. 22 '05	May 31 '06	260.00	
	Isabelle	100779	76	"	Jul. 22 '05	May 31 '06	76.00	
	Sarah	116856	588					
	Susie	116855	588					
	Louise	141572	384					
	Rock Island	111177	267					
	Seattle No. 3	116854	326					
	Leah	141556	295					
	Tanana	201297	372					
1906	Herman	96398	164	Nome	July 2 '06	May 31 '07	164.00	Operated to foreign ports -do- " " " " " " " "
	Ida May	111182	267	"	July 2 '06	May 31 '07	267.00	
	Delta	202463	237	Fairbanks	Jul. 12 '06	Jul. 18 '07	237.00	
	D. R. Campbell	157509	409	Nome	Sept. 15 '06	Sept. 7 '07	409.00	
	Margaret	92890	260	Fairbanks	Jul. 12 '06	Jun. 1 '07	260.00	
	Isabelle	100779	76	"	Jul. 12 '06	Jun. 1 '07	76.00	
	Louise	141572	384	Nome	Jul. 2 '06	Jun. 30 '07	384.00	
	Leah	141556	295	"	Oct. 10 '06	May 31 '07	295.00	
	Koyukuk	203496	149	"	Oct. 5 '06	Jul. 28 '07	149.00	
	Sarah	116856	588					
	Hannah	96428	588					
	Lavelle Young	141529	396					
	Tanana	201297	372					
	Seattle No. 3	116854	326					

RECORD OF NORTHERN NAVIGATION STEAMERS OPERATED AND TONNAGE LICENSES PAID.

Sea- son.	Steamer.	Regis- ter Number.	Net Ton- nage.	License At.	Date.	Taken. Expiring.	Amount Paid.	Remarks.
1909	Herman	96398	164	Nome	Jul. 24 '09	Jun. 22 '10	164.00	Operated to foreign ports -do- " " " " " " " "
	Louise	141572	384	"	Sept. 25 '09	Augt. 3 '10	384.00	
	Seattle No. 3	116854	326	"	Jul. 24 '09	July 7 '10	326.00	
	St. Michael	116816	409	"	Jul. 24 '09	Jun. 21 '10	409.00	
	Koyukuk	203496	149	Fairbanks	Jul. 28 '09	Jul. 27 '10	153.00	
	Susie	116855	588					
	Hannah	96428	588					
1910	D. R. Campbell	157509	409					Operated Jun. 15 to Aug. 1 '10, 1909 License operative to Aug. 3 '10 Operated to foreign ports. -do- " " " " " "
	Delta	202468	237					
	Schwatka	116812	291					
	Delta	202463	237					
	Reliance	204486	171					
	Herman	96398	164	Nome	Jul. 25 '10	Jun. 22 '11	164.00	
	D. R. Campbell	157509	409	"	Jul. 25 '10	Jun. 21 '11	409.00	
1910	Seattle No. 3	116854	326	Fairbanks	Jun. 28 '10	May 24 '11	326.00	Operated Jun. 15 to Aug. 1 '10, 1909 License operative to Aug. 3 '10 Operated to foreign ports. -do- " " " " " "
	Tanana	201297	372	"	Jun. 28 '10	May 24 '11	372.00	
	Koyukuk	203496	149	"	Jun. 28 '10	Jul. 27 '11	153.00	
	Lavalle Young	141529	396	Nome	Jul. 25 '10	July 8 '11	396.00	
	Leota	141541	24	"	Jul. 25 '10	June 19 '11	24.00	
	Delta	202463	237	Fairbanks	Jun. 28 '10	May 24 '11	237.00	
	Louise	141572	384					
1910	Sarah	116856	588					Operated Jun. 15 to Aug. 1 '10, 1909 License operative to Aug. 3 '10 Operated to foreign ports. -do- " " " " " "
	Susie	116855	588					
	St. Michael	116816	409					
	Reliance	204486	171					
1910	Schwatka	116812	291					Operated Jun. 15 to Aug. 1 '10, 1909 License operative to Aug. 3 '10 Operated to foreign ports. -do- " " " " " "
	Schwatka	116812	291					

RECORD OF NORTHERN NAVIGATION STEAMERS OPERATED AND TONNAGE LICENSES PAID.

Sea- son.	Steamer.	Regis- ter Number.	Net Ton- nage.	License At.	Date.	Taken. Expiring.	Amount Paid.	Remarks.
1911	Herman	96398	164	Nome	Jul. 17 '11	Jun. 22 '12	164.00	
	Seattle No. 3	116854	326	"	Jul. 17 '11	Jun. 18 '12	326.00	
	Tanana	201297	372	Fairbanks	June 5 '11	May 24 '12	372.00	
	Lavelle Young	141529	396	"	Aug. 12 '11	July 8 '12	396.00	
	Delta	202463	237	"	June 5 '11	May 24 '12	237.00	
	Louise	141572	384	Nome	Jul. 17 '11	Jun. 27 '12	384.00	
	Reliance	204486	171	Fairbanks	June 5 '11	May 31 '12	171.00	
	Wilbur Crimmin	81606	159	Nome	Jul 17 '11	Jul. 31 '12	59.00	
	Alice	206095	145	Fairbanks	Aug. 12 '11	Jun. 12 '12	145.00	
	Klondyke	161114	242	Nome	Jul. 17 '11	Jun. 14 '12	242.00	
	Meteor	93031	40	"	Augt. 3 '11	Jun. 14 '12	40.00	
	Sarah	116856	588					Operated to foreign ports
	Susie	116855	588					"
	St. Michael	116816	409					"
	Schwatka	116812	291					"

San Francisco
February 16, 1912.
[48]

Mr. McGOWAN.—I produce at this time and offer in evidence Certificate of the Clerk of the District Court for the Fourth Division of the Territory of Alaska, showing the payments made by the companies for licenses on the boats shown on this list, this for the purpose of letting the Government and the Referee check if they so desire.

Statement admitted and marked Defendant's Referee's Exhibit No. 2. [49]

[Defendant's Referee's Exhibit No. 2—List of Licenses.]

LIST OF LICENSES ISSUED FOR STEAMERS REGISTERED IN ALASKA, PLYING IN ALASKA WATERS, BASED UPON THE NET TONNAGE, CUSTOM HOUSE MEASUREMENT OF EACH VESSEL.

Date Paid:	Steamer:	Tonnage:	License begins:	Amount:
ISSUED TO NORTHERN COMMERCIAL CO.				
July 14, 1906.	"Margaret"	260	June 1, 1906.	\$260.00
July 14, 1906.	"Delta"	237	July 19, 1906.	237.00
July 14, 1906.	"Isabelle"	76	June 1, 1906.	76.00
ISSUED TO NORTHERN NAVIGATION CO.				
June 8, 1907.	"Isabelle"	76	June 1, 1907.	76.00
June 20, 1907.	"Tanana"	372	May 18, 1907.	372.00
July 27, 1908.	"Delta"	237	July 18, 1908.	237.00
July 27, 1908.	"Koyukuk"	153	July 28, 1908.	153.00
Aug. 5, 1908.	"Reliance"	171	July 30, 1908.	171.00
Sep. 29, 1909.	"Koyukuk"	153.	July 28, 1909.	153.00
June 27, 1910.	"Delta"	237.	May 25, 1910.	237.00
June 27, 1910.	"Tanana"	372.	May 25, 1910.	372.00
June 27, 1910.	"Seattle #3"	326.	May 25, 1910.	326.00
July 28, 1910.	"Koyukuk"	153	July 28, 1910.	153.00
June 5, 1911.	"Delta"	237	May 25, 1911.	237.00
June 5, 1911.	"Tanana"	372	May 25, 1911.	372.00
June 5, 1911.	"Reliance"	171	June 1, 1911.	171.00
Aug. 10, 1911.	"Lavelle Young"	396	July 9, 1911.	396.00
Aug. 10, 1911.	"Alice"	145	July 15, 1911.	145.00
July 16, 1907.	"Margaret"	260	July 22, 1907.	260.00
July 16, 1907.	"Delta"	237	July 22, 1907.	237.00
July 16, 1907.	"Koyukuk"	153	July 22, 1907.	153.00

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing is a full, true and correct list of all Licenses issued to The Northern Commercial Company and the Northern Navigation Company, for the tonnage of certain steamers named therein and plying in Alaska waters, from April 1, 1905, to March 18, 1912, together with the date that each license began and the amounts paid thereon, as same appears from the records in my office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court, at Fairbanks, Alaska, this 18th day of March, 1912.

[Seal] C. C. PAGE,
Clerk of District Court, Territory of Alaska, Fourth
Division. [51]

Mr. McGOWAN.—I now hand you certificate of the Clerk of the Court at Nome, Alaska, which shows payments made on the boats in question as license fees during the years in controversy.

Certificate admitted by referee and marked
“Defendant’s Referee’s Exhibit No. 3.” [52]

**[Defendant's Referee's Exhibit No. 3—License Fees
Paid on Steamers by the Northern Commercial
Co. During the Years 1905 to 1911, Inclusive.]**

LICENSE FEES PAID ON STEAMERS BY THE NORTHERN COMMERCIAL COMPANY DURING THE YEARS 1905 TO 1911 INCLUSIVE.

Name of Steamer.	Period of License.		Amount Paid.
	From.	To.	
Herman	June 1, 1905	May 31, 1906	\$164.00
Margaret	June 1, 1905	May 31, 1906	260.00
Delta	July 18, 1905	July 17, 1906	237.00
Isabel	June 1, 1905	May 31, 1906	76.00
Ida May	June 29, 1905	June 28, 1906	267.00
D. R. Campbell	Sept. 8, 1905	Sept. 7, 1906	409.00
Louise	June 1, 1906	May 31, 1907	384.00
Ida May	June 29, 1906	June 28, 1907	267.00
Herman	June 1, 1906	May 31, 1907	164.00
D. R. Campbell	Sept. 8, 1906	Sept. 7, 1907	409.00
Koyukuk	July 29, 1906	July 28, 1907	149.00
Leah	June 1, 1906	May 31, 1907	295.00
St. Michael	June 1, 1907	May 31, 1908	409.00
Herman	June 17, 1907	June 16, 1908	164.00
D. R. Campbell	June 22, 1907	June 21, 1908	409.00
Ida May	July 5, 1907	July 4, 1908	267.00

United States of America,
District of Alaska,
Second Division,—ss.

I, John Sundback, Clerk of the District Court for the District of Alaska, Second Division, do hereby certify that I have compared the foregoing with the License Register of this office, and find that the same is a true and correct copy of the entries in said License Register covering payments made by the Northern Commercial Company during the period stated.

Witness my hand and the seal of said Court this
18th day of March, A. D. 1912.

[Seal]

J. SUNDBACK,

Clerk. [53]

LICENSE FEES PAID ON STEAMERS BY THE NORTHERN NAV-
IGATION COMPANY DURING THE YEARS 1905 TO 1911 IN-
CLUSIVE.

Name of Steamer.	Period of License.		Amount. Paid.
	From.	To.	
Reliance	July 30, 1907	July 29, 1908	\$171.00
Louise	Aug. 3, 1907	Aug. 2, 1908	384.00
Herman	June 17, 1908	June 16, 1909	164.00
Seattle No. 3	June 26, 1908	June 25, 1909	326.00
Louise	Aug. 3, 1908	Aug. 2, 1909	384.00
Herman	June 23, 1909	June 22, 1910	164.00
St. Michael	June 22, 1909	June 21, 1910	409.00
Seattle No. 3	July 8, 1909	July 7, 1910	326.00
Louise	Aug. 3, 1909	Aug. 2, 1910	384.00
Herman	June 23, 1910	June 22, 1911	164.00
D. R. Campbell	June 22, 1910	June 21, 1911	409.00
Lavelle Young	July 9, 1910	July 8, 1911	396.00
Leotta	June 10, 1910	June 9, 1911	24.00
Louise	June 28, 1911	June 27, 1912	384.00
Herman	June 23, 1911	June 22, 1912	164.00
Seattle No. 3	June 19, 1911	June 18, 1912	326.00
Wilbur Crimmin	Aug. 1, 1911	July 31, 1912	59.00
Klondyke	June 15, 1911	June 14, 1912	242.00
Meteor	June 15, 1911	June 14, 1912	40.00

United States of America,
District of Alaska,
Second Division,—ss.

I, John Sundback, Clerk of the District Court for
the District of Alaska, Second Division, do hereby
certify that I have compared the foregoing with the
License Register of this office, and find that the same
is a true and correct copy of the entries in said
License Register covering payment made by the

(Testimony of Volney Richmond.)

Northern Navigation Company during the period stated.

Witness my hand and the seal of said Court this 18th day of March, A. D. 1912.

[Seal]

J. SUNDBACK,

Clerk. [54]

Mr. McGOWAN.—Q. Mr. Richmond, the company has made all these payments for licenses as shown by Certificates of the Clerks of Court, marked Defendants' Referee's Exhibit Nos. 2 and 3?

A. They have.

Mr. McGOWAN.—Referring to Defendants' Referee's Exhibit No. 1, we admit for the purpose of this case that neither the Northern Commercial Company or the Northern Navigation Company paid license fees on the steamers marked "Operated to foreign ports" during the years 1905, 1906, 1907, 1908, 1909, 1910 and 1911.

(By Mr. McGOWAN.)

Q. Mr. Richmond, will you kindly look at Defendants' Referee's Exhibit No. 1 at the boats marked "Operated to foreign ports," and state as to whether or not those boats were operated as shown in that list during the respective years?

A. The boats shown were operated to foreign ports as listed in this exhibit.

Q. What foreign port or ports did the boats run to?

A. To Dawson, Yukon Territory, Canada.

Q. Then I take it from your testimony that in the year 1905 the steamers "Sarah," net tonnage 588,

(Testimony of Volney Richmond.)

"Susie," net tonnage 588, "Louise," net tonnage 384, "Rock Island," net tonnage 267, "Seattle No. 3," net tonnage 326, "Leah," net tonnage 295, and "Tanana," net tonnage 372, were operated on the Yukon River in both Alaska and Canada.

A. They were.

Q. Now, then, the same question as to the steamers "Sarah," net tonnage 588, "Hannah," net tonnage 588, "Lavelle Young," net tonnage 396, "Tanana," net tonnage 372 and "Seattle No. 3," net tonnage 326, [55] were operated on the Yukon River in both Alaska and the Yukon Territory, Canada, during the year 1906.

By Mr. BROWN.—Objected to on the ground that it is immaterial and also to the previous question, that under the law it makes no difference whether they were so operated or not as long as they were operated in American waters in Alaska.

A. They were.

Q. Now, for the year 1907, the steamers "Sarah," net tonnage 588, "Hannah," net tonnage 588, "Lavelle Young," net tonnage 396, "Seattle No. 3," net tonnage 326 and "Schwatka," net tonnage 291, where were they operated during the year 1907?

Mr. BROWN.—Same objection.

A. On the Yukon River in the United States and Canada.

Q. In the year 1908, as to the steamers "Susie," net tonnage 588, "D. R. Campbell," net tonnage 409, "Tanana," net tonnage 372, "Lavelle Young," net tonnage 396, "Schwatka," net tonnage 291, "Sarah,"

(Testimony of Volney Richmond.)

net tonnage 588, and "Hannah," net tonnage 588, where were they operated?

Mr. BROWN.—Same objection.

A. On the Yukon River in Alaska and Yukon Territory.

Q. In the year 1909, as to steamers "Susie," net tonnage 588, "Hannah," net tonnage 588, "D. R. Campbell," net tonnage 409, "Tanana," net tonnage 372, "Schwatka," net tonnage 291, "Delta," net tonnage 237 and "Reliance," net tonnage 171, where were they operated?

Mr. BROWN.—Same objection.

A. On the Yukon River in Alaska and Yukon Territory, Canada.

Q. In the year 1910, the Steamers "Louise," net tonnage 384, "Sarah," net tonnage 588, "Susie," net tonnage 588, "St. Michaels," net tonnage 409, "Reliance," net tonnage 171 and "Schwatka," net tonnage 291, where were they operated?

Mr. BROWN.—Same objection.

A. On the Yukon River in the Territory of Alaska and Yukon Territory, Canada. [56]

Q. In 1911, steamers "Sarah," net tonnage 588, "Susie," net tonnage 588, "St. Michael," net tonnage 409, and "Schwatka," net tonnage 291, where were they operated?

Mr. BROWN.—Same objection.

A. On the Yukon River in the United States and Canada.

Q. I hand you Defendant's Exhibit No. 2 as offered at the trial of this action before Judges Over-

(Testimony of Volney Richmond.)

field and Cushman and admitted in evidence on August 19th, 1911, and ask you, Mr. Richmond, if all of the boats that you have just testified to as having been operated foreign, were operated to the port of Dawson, Yukon Territory, Canada, as shown by the Exhibit which I have just handed you.

Mr. BROWN.—We object to that on the ground that the evidence sought to be elicited from the witness to the question is immaterial, for the reason that the document the witness is questioned about purports to show the payment of license tax or tonnage tax in the Dominion of Canada, and it is immaterial whether any such tax was paid, the ships in question being American vessels and subject to the payment of license tax provided by the Code of Alaska notwithstanding the payment of tonnage tax in the Dominion of Canada or any other foreign country.

A. They were.

Q. And were subject to the same laws and same tax?

Mr. BROWN.—Objected to on the same ground.

A. They were.

Mr. BROWN.—The Government does not object to the admission of the receipts or documents shown to the witness on the ground that they are not the best evidence, nor on the ground that they are incompetent to prove the matters desired, but on the ground heretofore stated, that the payment of a tonnage [57] tax in Canada or any other foreign country does not exempt owners of vessels from the payment of license tax for the Territory of Alaska.

(Testimony of Volney Richmond.)

Mr. McGOWAN.—Offering your objection to materiality, you admit that these payments were made?

Mr. BROWN.—For the purpose of the case, the Government admits that the payments were made, but denies that the fact they were made is material to the issues in this case.

Mr. McGOWAN.—And this admission is to go to all the boats operated foreign?

Mr. BROWN.—Yes.

Mr. McGOWAN.—Q. Mr. Richmond, is it not a fact that during the years 1905 and 1906 the steamers as shown in this list were operated by the Northern Commercial Company?

A. Yes, sir.

Q. And after the year 1906 and during the years 1907, 1908, 1909, 1910 and 1911, who operated all the steamers as shown on Defendants' Referee's Exhibit No. 1? A. The Northern Navigation Company.

Q. How did that come about?

A. Through the Northern Navigation Company operating the steamers themselves. Previous to that time they had been operated by the Northern Commercial Company.

Q. The Northern Navigation Company originally owned all these steamers, and chartered them to the Northern Commercial Company for the years 1905 and 1906? A. They did, with possibly one exception.

Q. What was that?

A. The steamer "Tanana."

(Testimony of Volney Richmond.)

Q. And since 1907 and to 1911, inclusive, the Northern Navigation Company has been operating the steamers in its own behalf? A. It has.

Q. And separate from the Northern Commercial Company? [58] A. It has.

Mr. BROWN.—I will state to the Referee that the Government, in view of the testimony of the witness now on the stand, Mr. Volney Richmond, intends to move the Court for an order joining the Northern Navigation Company, a corporation, as a codefendant with the Northern Commercial Company, in order that the whole of the license tax may be settled in one suit thus saving a multiplicity of suits.

Mr. McGOWAN.—We will attend before the Court and consent to an order that the Northern Navigation Company be made a party to this action.

Mr. BROWN.—No cross-examination.

[Testimony of Thomas A. McGowan, for Defendant.]

THOMAS A. McGOWAN, being first duly sworn, testified as follows (it being consented that Mr. McGowan make a statement without going through the form of questions and answers):

Mr. McGOWAN.—Defendants' Referee Exhibit No. 1 was made at our home office in San Francisco under my supervision and is a correct statement from the records kept at that place. Referring to the year 1908, it appears that three of our boats, known as the Packets, namely: the "Susie," "Sarah" and "Hannah," were operated during the one season. It was customary at that time to operate but two of those boats and three of them were

(Testimony of Thomas A. McGowan.)

operated during that season for this reason. Some time in August the steamer "Sarah" was disabled and was compelled to go on the ways for repairs, and on or about August 25th, which was about six weeks before the close of the open season of navigation, the steamer "Hannah" was put on to replace her, making one round trip from St. Michaels to Dawson between August 26th and September 23d, and it is our contention that [59] the license for the steamer "Sarah" should be transferred so as to cover this last trip of the steamer "Hannah" under the circumstances just given.

Mr. BROWN.—Counsel for the Government moves to strike out the statement of Mr. McGowan in his testimony that the steamer "Hannah" was operated for one trip in place of the steamer "Sarah," for the reason that it is immaterial, has no bearing upon any of the issues in this case and that the payment of the license tax for the steamer "Sarah" did not exempt the steamer "Hannah" from a similar license tax provided she was operated at all in Alaska waters during the year 1908.

Mr. BROWN.—No cross-examination.

Redirect Examination.

Mr. McGOWAN.—The steamer "Sarah" was operated foreign during the year 1908 and when the steamer "Hannah" was put in commission to replace her she was also operated foreign, as appears by the list of steamers for the year 1908 in Defendants' Referee's Exhibit No. 1.

Mr. BROWN.—Counsel for the Government

(Testimony of Thomas A. McGowan.)

makes the same motion to strike as the last above motion, and makes the motion to strike instead of having objected to the testimony before it was given, for the reason that the testimony was given in narrative form without question and there was no opportunity to make the objection before the witness testified. One more question I would like to ask Mr. Richmond—whether the boats named in this Exhibit No. 1 are all the boats that were operated on Alaskan waters during the years 1905 to 1911 inclusive?

A. They are the entire list of boats operated by the Northern Commercial Company and the Northern Navigation Company.

Mr. McGOWAN.—Mr. Brown, I have here the 42nd Annual List of Merchant [60] Vessels of the United States, issued by the Department of Commerce and Labor, Bureau of Navigation, with official numbers and signal letters, for the year 1910, which shows the net tonnage of all the boats in question upon which license fees have not been paid. I understand they have already been checked by the Referee and he finds that they agree with our Exhibit No. 1. Can it be consented that our list agrees with this official record and that we need not offer it in evidence?

Mr. BROWN.—Counsel for the Government agrees that the net tonnage of the different vessels operated by the Northern Navigation Company and the Northern Commercial Company during the years 1905 to 1911, inclusive, as shown by the book just

(Testimony of Thomas A. McGowan.)

referred to by Mr. McGowan, agrees with the statement of the net tonnage of the same vessels as shown by Defendants' Referee's Exhibit No. 1.

(Matter continued until 2 o'clock May 9th, 1912, for the purpose of procuring an order of the court making Northern Navigation Company a party.)

The above matter coming on for hearing on this 9th day of May, 1912, at 2 o'clock P. M. Mr. Thos. A. McGowan appears and files copy of order of the Court adding Northern Navigation Company as party defendant. [61]

That the testimony was then closed and the matter submitted to said Referee for his findings and decision, and thereafter and on or about the 15th day of May, 1912, said Referee, in pursuance of said order of Court heretofore referred to, submitted to the above-entitled court his Report and Findings, which was as follows, to wit: [62]

[Title of Court and Cause.]

Report of Referee.

To the Hon. PETER D. OVERFIELD, Judge of the District Court for the Territory of Alaska, Fourth Division.

Pursuant to the order of this Court in this action, made on the 24th day of August, 1911, by Peter D. Overfield and Edward E. Cushman, District Judges, appointing the undersigned, Guy B. Erwin, Referee, to hear proofs and take testimony as to any and all matters and things involving or respecting the amount of License Tax due by defendants to the United States of America, on the net tonnage, cus-

tom house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power for the years 1905, 1906, 1907, 1908, 1909, 1910, and 1911, inclusive, at the rate of One Dollar (\$1.00) per ton, I, the undersigned Referee, beg leave to report as follows:

I.

That I have been attended by attorneys for the respective parties, the United States of America appearing by J. J. Crossley, U. S. District Attorney, and John K. Brown, Asst. U. S. District Attorney, and the defendant appearing by its attorneys, Messrs. McGowan and Clark, and I proceeded to a hearing of the matter so referred. [63]

II.

I further report that on such hearing Defendant's Referee Exhibits Nos. 1, 2 and 3, being respectively, Record of Northern Navigation Company Steamers operated and tonnage license paid; Certificates of the Clerk of Court, 4th Division, showing list of licenses issued to Northern Commercial Company and Northern Navigation Company for steamers plying in Alaska waters from April 1st, 1905 to March 18th, 1912; and, Certificates of Clerk of Court, Second Division, showing license fees paid on steamers by Northern Commercial Company during the years 1905 to 1911, inclusive, were offered by defendant's attorneys, accepted by me and filed, and that Mr. Volney Richmond and Mr. Thomas A. McGowan, witnesses produced by the defendants, were duly sworn by me and gave their testimony in said matter,

and a transcript of such testimony, together with a report of all proceedings had before me, and said exhibits, are herewith filed with the Clerk of said court as a part of this report.

That after a full examination and consideration of said matter I find as follows:

III.

That both the Northern Commercial Company and the Northern Navigation Company have procured the Licenses required by Section 460 of the Code of Civil Procedure of the Territory of Alaska for each and every one of the registered steamers owned by said companies and operated wholly within the waters of the Territory of Alaska during the years 1905 to 1911, inclusive.

IV.

That neither the Northern Commercial Company nor the Northern Navigation Company have procured the licenses required by said Section 460 of the Code of Civil Procedure of the Territory of Alaska for any of its steamers operated foreign during the years 1905 to 1911, inclusive. [64]

V.

That the Northern Commercial Company and the Northern Navigation Company are liable to pay to the United States a license tax of one dollar per ton per annum on the net tonnage, custom house measurement, of each of its freight and passenger steamers registered in the Territory of Alaska operated foreign, i. e., on the Yukon River and its tributaries, both in the Territory of Alaska and Yukon Territory, Dominion of Canada, for the years 1905 to 1911, inclusive.

VI.

That with respect to the Northern Commercial Company, I find as follows:

(1) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(2) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Susie," net tonnage 588.

(3) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Louise," net tonnage 384.

(4) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Rock Island," net tonnage 267.

(5) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Seattle No. 3," net tonnage 326.

(6) For the year 1905 that the Northern Commercial Company failed to take out a license for the steamer "Leah," net tonnage 295.

(7) For the year 1905 the Northern Commercial Company failed to take out a license for the steamer "Tanana," net tonnage 372. [65]

(8) For the year 1906 that the Northern Commercial Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(9) For the year 1906 that the Northern Commercial Company failed to take out a license for the steamer "Hannah," net tonnage 588.

(10) For the year 1906 that the Northern Commercial Company failed to take out a license for the

steamer "Lavelle Young," net tonnage 396.

(11) For the year 1906 that the Northern Commercial Company failed to take out a license for the steamer "Tanana," net tonnage 372.

(12) For the year 1906 that the Northern Commercial Company failed to take out a license for the steamer "Seattle No. 3," net tonnage 326; and that the said Northern Commercial Company is liable to pay to the United States as license tax on its said steamers for the years 1905 to 1906, inclusive, the total sum of Five Thousand and Ninety Dollars (\$5,090.00).

VII.

That with respect to the Northern Navigation Company, I find as follows:

(1) For the year 1907 that the Northern Navigation Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(2) For the year 1907 that the Northern Navigation Company failed to take out a license for the steamer "Hannah," net tonnage 588.

(3) For the year 1907 that the Northern Navigation Company failed to take out a license for the steamer "Lavelle Young," net tonnage 396.

(4) For the year 1907 that the Northern Navigation company failed to take out a license for the steamer "Seattle [66] No. 3," net tonnage 326.

(5) For the year 1907 that the Northern Navigation Company failed to take out a license for the steamer "Schwatka," net tonnage 291.

(6) For the year 1908 that the Northern Navigation Company failed to take out a license for the

steamer "Susie," net tonnage 588.

(7) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "D. R. Campbell," net tonnage 409.

(8) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Tanana," net tonnage 372.

(10) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Lavelle Young," net tonnage 396.

(11) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Schwatka," net tonnage 291.

(12) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(13) For the year 1908 that the Northern Navigation Company failed to take out a license for the steamer "Hannah," net tonnage 588.

(14) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Susie," net tonnage 588.

(15) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Hannah," net tonnage 588. [67]

(16) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "D. R. Campbell," net tonnage 409.

(17) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Tanana," net tonnage 372.

(18) For the year 1909 that the Northern Navi-

gation Company failed to take out a license for the steamer "Schwatka," net tonnage 291.

(19) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Delta," net tonnage 237.

(20) For the year 1909 that the Northern Navigation Company failed to take out a license for the steamer "Reliance," net tonnage 171.

(21) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Louise," net tonnage 384.

(22) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(23) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Susie," net tonnage 588.

(24) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "St. Michael," net tonnage 409.

(25) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Reliance," net tonnage 171.

(26) For the year 1910 that the Northern Navigation Company failed to take out a license for the steamer "Schwatka" net tonnage 291. [68]

(27) For the year 1911 that the Northern Navigation Company failed to take out a license for the steamer "Sarah," net tonnage 588.

(28) For the year 1911 that the Northern Navigation Company failed to take out a license for the steamer "Susie," net tonnage 588.

(29) For the year 1911 that the Northern Navigation Company failed to take out a license for the steamer "St. Michael," net tonnage 409.

(30) For the year 1911 that the Northern Navigation Company failed to take out a license for the steamer "Schwatka," net tonnage 291; and that the said defendant Northern Navigation Company is liable to pay to the United States as license tax on its said steamers operated foreign, for the years 1907 to 1911, inclusive, the total sum of twelve thousand three hundred and eighty-four (\$12,384.00).

Dated the 15th day of May, A. D. 1912.

G. B. ERWIN,
Referee.

[Indorsed]: No. 612. (Title of Court and Cause.)
Filed in the District Court, Territory of Alaska, 4th
Div. May 16, 1912. C. C. Page, Clerk. By H. C.
Green, Deputy. [69]

That thereafter and by consent of the attorneys for
plaintiff and defendant, the Court made and entered
an order, which is in the words and figures as follows,
to wit: [70]

[Title of Court and Cause.]

**Order [Adding Northern Navigation Co. as a Party
Defendant; Amending Original Statement of
Facts, etc.].**

It appearing, from the testimony produced before
Guy B. Erwin, Esquire, the Referee heretofore ap-
pointed in the above-entitled cause to take the testi-
mony as to the license fees due on the various steam-
boats mentioned and operated as shown by the State-

ment of Facts in this action, that, during the years 1905 and 1906, the said boats were operated by the Northern Commercial Company, the above-named defendant, and that thereafter the said boats were operated by the Northern Navigation Company, as the successor of the said Northern Commercial Company; that thereupon John K. Brown, Esquire, Assistant United States District Attorney, representing the plaintiff, moved before said Referee that the said Northern Navigation Company be added as a party defendant to this action, so that all the matters in controversy with reference to the said steamboat taxes might be adjudicated in this action, thereby avoiding a multiplicity of actions; the said Northern Navigation Company, a corporation organized under the laws of the State of New Jersey, being represented at the hearing before said Referee by its Counsel, Thomas A. McGowan, Esquire, and consenting thereto; that thereupon the said Referee adjourned the said proceedings pending the further order of this Court in the Premises; and it appearing to the satisfaction of this Court that said Northern Navigation Company is a necessary party defendant to this proceeding; [71]

Now, therefore, it is ordered that the said Northern Navigation Company, a corporation as aforesaid, be added as a party defendant to this proceeding, and the Clerk of this Court is hereby ordered to insert the name of said Northern Navigation Company in the title of the original Statement of Facts as a party defendant in said proceeding;

It is further ordered that paragraph one on page

one of said original Statement of Facts, be amended as follows:

Strike out the first two words of said paragraph, namely "the defendant," and insert in lieu thereof the words "each of the above named defendants";

And that the following paragraph be added to said Statement of Facts, to wit:

"xlx.—That when these proceedings were instituted the defendant Northern Commercial Company was operating the steamboats herein before mentioned and described, and that, since the commencement of this proceeding, the added defendant Northern Navigation Company took over and acquired the said steamboats from its codefendant, Northern Commercial Company, and has been operating the same. In other words, during a period of time between the year 1905 and the year 1911 the Northern Commercial Company operated said boats, and during another portion of said time the said boats were operated by the Northern Navigation Company."

It is further ordered that said Statement of Facts and Stipulation, as amended as above, need not be engrossed, and that the amendments aforesaid shall be considered as a part thereof, the same as though the Stipulation and Statement had been engrossed setting forth the same. [72]

It is further ordered that all proceedings heretofore had and taken in this action shall apply to and cover the said Northern Navigation Company the same as though it had been an original party to these proceedings, and there shall be reserved to it all

rights, objections and exceptions, heretofore taken by its codefendant the Northern Commercial Company in these proceedings, and that all testimony and evidence introduced and produced at the trial of this action before Judges Overfield and Cushman shall be considered as taken on behalf of the said Northern Navigation Company;

It is further ordered that the testimony heretofore taken before the Referee shall be considered as testimony introduced on behalf of said Northern Navigation Company as well as on behalf of its said codefendant, and the said Referee is hereby authorized and empowered to take such further testimony as may be offered on behalf of said Northern Navigation Company, and report to this court the license fees which he shall find, if any, which are payable by the said Northern Navigation Company, and the license fees, if any, which are payable by the said Northern Commercial Company, as they shall appear from the testimony introduced;

It is further ordered that, in determining this controversy, these proceedings shall be considered as applications by the said Northern Commercial Company and the said Northern Navigation Company respectively for such licenses as each of said Companies should have taken out in connection with the operating of said steamboats, if they were in fact required to take out any licenses, and that, if a judgment be rendered against the said defendants such judgment may be several, that is to say, a judgment against the Northern Commercial Company for the [73] license fees that it shall be required to pay and

a judgment against the Northern Navigation Company for the license fees that it shall be required to pay;

It is further ordered that all rights reserved by the said Original Statement of Facts and Stipulation to the Northern Commercial Company are hereby reserved to the said Northern Navigation Company, including the right to review by appeal or otherwise any judgment that may be given in this court against said defendant;

It is further ordered that the Referee, Guy B. Erwin, Esquire, be and he is hereby given and granted up to and including the 17th day of May, 1912, within which to file his report and recommendations in the above-entitled matter.

Done in open court at Fairbanks, Alaska, this 9th day of May, 1912.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 11, page 886.

Consented to:

JAMES J. CROSSLEY,
United States District Attorney.

JOHN K. BROWN, Asst.

McGOWAN & CLARK,
Attorneys for Northern Commercial Company and
Northern Navigation Company.

[Indorsed]: No. 612. (Title of Court and Cause.)
Filed in District Court, Territory of Alaska, 4th
Div. May 9th, 1912. C. C. Page, Clerk. By H. C.
Green, Deputy. [74]

That thereafter and on or about the 31st day of

May, 1912, defendants herein served and filed its motion to set aside the Report of the Referee, and objections to his findings, which were as follows, to wit: [75]

[Title of Court and Cause.]

Motion to Set Aside Report of Referee.

Now come the above-named defendants, the Northern Commercial Company and the Northern Navigation Company, and move the Court to set aside the report, and the findings of fact and conclusions of law set forth therein, and each and all thereof, made by Guy B. Erwin, the Referee heretofore appointed herein, and object to the adoption thereof, on the following grounds, to wit:

I.

That paragraph V of said report is not sustained by the evidence and is contrary to law, for the following reasons, to wit:

(a) That it appears from the evidence that all of the steamers covered by said paragraph V were operated by one of the defendants on the waters of the Yukon River, between ports in the Territory of Alaska and the Port of Dawson in the Yukon Territory, Dominion of Canada, the latter being foreign waters and waters elsewhere than in Alaska, and that each and all of said steamers were required to, and did, pay a license or tax in the Yukon Territory, Dominion of Canada.

II.

That the defendant, the Northern Commercial Company, objects to paragraph VI of said Referee's

report, and each and all of the findings therein set forth, and moves that the same [76] be set aside and stricken out, for the reason that the findings numbered 1 to 12 inclusive, and each and all of them, set forth in said paragraph VI, are contrary to law, in this that the steamer mentioned in each of said separate findings was operated by the said defendant beyond the Territory of Alaska, that is to say, on the waters of the Yukon River within the Yukon Territory of the Dominion of Canada, and each and all of them were required to, and did, pay a license or tax in the said Yukon Territory of the Dominion of Canada; and that therefore the said defendant is not liable to pay to the United States a license tax on its said steamers, as found in finding 12 of said paragraph VI.

III.

That finding 12 of said paragraph VI is contrary to the evidence and the law, for the reason that the said Company is not liable to pay to the United States the sum of \$5,090.00, or any other sum, as license tax on its said steamers for the years 1905–1906 inclusive, as all of the steamers covered by said finding were operated in foreign waters and were required to, and did, pay a license or tonnage tax in the Dominion of Canada.

IV.

That the defendant, the Northern Commercial Company, now moves this Court that the entire findings as set forth in said paragraph VI of said report, be set aside, for the reason that said findings and all thereof are contrary to the evidence and the law.

V.

That the defendant, the Northern Navigation Company, objects to paragraph VII of said Referee's report, and each and all of the findings, numbered 1 to 30, inclusive, therein set forth, and moves that the same be set aside and stricken out, [77] for the reason that said findings, and each and all of them, are contrary to law, in this that the steamer mentioned in each of said separate findings was operated by the said defendant beyond the Territory of Alaska, that is to say, on the waters of the Yukon River, within the Yukon Territory of the Dominion of Canada, and each and all of them were required to, and did, pay a license or tax in the said Yukon Territory of the Dominion of Canada; and that therefore the said defendant is not liable to pay to the United States a license tax on its said steamers, as found in finding 30 of said paragraph VII.

VI.

That the defendant, the Northern Navigation Company, especially excepts to finding 13 contained in said paragraph VII, referring to the steamer "Hannah," on the ground that the same is contrary to the evidence, in this, that it appears from the uncontradicted evidence that the steamer "Hannah" was operated for only one trip during the season of 1908, and was operated solely for the purpose of making a trip for the steamer "Sarah," which had become disabled, and that, if the steamer "Sarah" is liable to pay a license for said year 1908, the said license could be transferred to the steamer "Hannah"; and that, inasmuch as the Referee finds that the steamer

“Sarah” was liable for a license for the year 1908, said license could have been transferred to the steamer “Hannah,” and that said defendant, the Northern Navigation Company, if liable at all, would only be liable for one license fee for both of said boats during said season.

VII.

Defendants further object to the report of said Referee, and the whole thereof, excepting the transcript of testimony filed by him, on the ground that the order appointing said Referee did not authorize the Referee to make findings of fact [78] and conclusions of law, but simply provided that the Referee proceed to hear proofs and take testimony and report the same to the Court, so that the Court could find thereon, and defendants do now move to set aside all the findings made by said Referee wherein he finds upon the facts and the law.

VIII.

Defendants except to the whole of paragraph V contained in said Referee’s report, on the ground that the same is not authorized by the order of reference in this matter.

IX.

The defendant, the Northern Commercial Company, excepts to the findings numbered 1 to 12, inclusive, contained in paragraph VI of said report, on the ground that the same are not authorized by the order of reference in this matter.

X.

The defendant, the Northern Navigation Company, excepts to the findings numbered 1 to 30, inclusive,

contained in paragraph VII of said report, for the reason that the same are not authorized by the order of reference in this matter.

XI.

The defendants except to each and all of the findings contained in paragraphs VI and VII of said report, on the ground that the same are contrary to the evidence given before the Court and the Referee in this proceeding, in this that it appears that all of the steamers mentioned in said findings were operated elsewhere than in Alaskan waters, to wit, in the waters of the Yukon Territory of the Dominion of Canada, and that said steamers, and each and all of them, were required, under the laws of the Dominion of Canada, to pay, and did pay, license or tonnage taxes in said Dominion of Canada, and elsewhere than in the Territory of Alaska. [79]

XII.

The defendants except to each and all of the findings contained in paragraphs VI and VII of said report, on the ground that the same are contrary to law, in that all of said steamers mentioned in said findings were operated beyond the waters of Alaska and in the waters of the Dominion of Canada, where they were required to, and did, pay license or tonnage taxes, and therefore were not liable to pay tonnage taxes within the territory of the United States.

XIII.

The defendants do now except to each and all of the findings contained in paragraphs V, VI, and VII, of said report.

XIV.

The defendants do now move that all parts of the

report of said Referee finding on facts and establishing conclusions of law be set aside and stricken out, and that the Court consider only that part of said Referee's report wherein he sets forth the testimony as taken before him.

Dated at Fairbanks, Alaska, this thirty-first day of May, A. D. one thousand nine hundred twelve.

McGOWAN & CLARK,

Attorneys for Defendant. [80]

Service of the within motion to set aside report of Referee and receipt of a copy acknowledged this 31st day of May, 1912.

JAMES J. CROSSLEY,

United States District Attorney,

Attorney for Plaintiff.

[Indorsed]: No. 612. Filed in the District Court, Territory of Alaska, 4th Div. May 31st, 1912. C. C. Page, Clerk. By H. C. Green, Deputy.

That thereafter the United States District Attorney, representing the plaintiff, filed his motion to confirm the Referee's Report and for judgment thereon, which said motion was as follows, to wit: [81]

[Title of Court and Cause.]

**Motion to Confirm Referee's Report and for
Judgment Thereon.**

Now comes the above-named plaintiff, by James J. Crossley, Esq., United States Attorney for the Fourth Judicial Division of the Territory of Alaska, and John K. Brown, Esq., Assistant United States Attorney, and moves this Honorable Court that the report of the Referee, Guy B. Erwin, Esq., filed

herein on the 16th day of May, 1912, be in all respects confirmed and that judgment be entered upon said report of the Referee in favor of the above-named plaintiff and against the above-named defendants and each of them in the amounts found by said Referee in his said report to be due from the said defendants respectively to the said plaintiff, for license tax on the net tonnage, custom-house measurement, of each of the freight and passenger steamships registered in the District of Alaska and propelled by mechanical power, for the years 1905 to 1911, inclusive, which said steamships are named in the said Referee's report.

This motion is based upon the said report of the said Referee and all the records, proceedings and files in the above-entitled action.

JAMES J. CROSSLEY,

United States Attorney.

JOHN K. BROWN,

Assistant United States Attorney. [82]

[Indorsed]: No. 612. (Title of Court and Cause.)
Filed in District Court, Territory of Alaska, 4th
Div. June 1st, 1912. C. C. Page, Clerk. By H. C.
Green, Deputy. [83]

That thereafter and on the 1st day of June, 1912, the motion of the plaintiff to confirm the Referee's Report and for judgment thereon came on regularly for hearing before the Honorable Peter D. Overfield, United States Attorney James J. Crossley and Assistant United States Attorney John Knox Brown appeared for and on behalf of the Government, and Thomas A. McGowan, Esq., counsel for the defend-

ants, appeared for the defendants, and the following proceedings were had, to wit: [84]

[Title of Court and Cause.]

**Transcript of Proceedings on Hearing of Motion to
Set Aside Report of Referee.**

Now, at this time, to wit, the 1st day of June, 1912, the above-entitled matter coming on to be heard before the Honorable Peter D. Overfield, U. S. District Attorney James J. Crossley and Assistant U. S. District Attorney John Knox Brown appearing on behalf of the Government, and Thomas A. McGowan, Esq., of counsel for defendants, appearing on behalf of the defendants, the following proceedings were had, to wit: [85]

Mr. McGOWAN.—I take it from the prior orders in the case, may the Court please—the orders rendered by Judge Cushman and yourself, that at this time we should consider this as a resumed trial from the last hearing. The matters were referred to a Referee for the purpose of taking the evidence, and after the evidence had been taken the trial was to be resumed under the order made at that time, before either yourself or Judge Cushman. And so as to have the record clear, I suggest at this time—and presume it is understood—that this is a continuation of the trial.

Mr. BROWN.—We submit the case on the evidence already introduced.

Mr. McGOWAN.—Now, if the Court please, we will take up the first action, 612.

Mr. BROWN.—Do you also submit it on the evidence?

Mr. McGOWAN.—I am coming to that now. We are taking up 612, United States against Northern Commercial Company and Northern Navigation Company. In addition to the evidence taken before the Referee, I presume you agree that all of the steamboats mentioned in the report of the Referee are stern-wheel river steamboats; and that there are no waters adjacent to the rivers of Alaska excepting foreign waters?

Mr. BROWN.—No, I don't know that that is so.

Mr. McGOWAN.—Well, that is the geological situation, and I presume we would simply have to produce maps, so that the Court would take judicial notice of it.

Mr. BROWN.—I don't concede that the Yukon River runs into foreign waters.

Mr. McGOWAN.—Well, the only adjacent waters—that is, in addition to the Alaskan waters, are the waters of [86] the Dominion of Canada.

Mr. BROWN.—I don't admit that all of the waters adjacent to Alaska are foreign waters.

Mr. McGOWAN.—I mean the interior—above the mouth.

Mr. BROWN.—Oh, yes.

Mr. McGOWAN.—That is admitted. The position is this: The Code says “elsewhere,” and I want to show that from the geographical conditions of this country, that the only “elsewhere” that Congress had in mind was in the surrounding country—the only possible “elsewhere” they had in mind was a foreign country. That is the purpose of it, just to qualify ourselves safely within that section.

Mr. BROWN.—Well, we will admit that the Yukon River runs from foreign territory through Alaska, and through Alaska to Bering Sea.

Mr. McGOWAN.—And that these boats are river steamboats, operating on the Yukon River, and not sea-going boats?

Mr. CROSSLEY.—Except that they go from St. Michael to Nome.

Mr. McGOWAN.—But not sea-going boats. Now, taking up 612. The Referee appointed to report the testimony has taken the testimony. He has also made his findings in that report, and we at this time move the Court to set aside the report, and the findings of fact and conclusions of law set forth therein, and each and all thereof, made by Guy B. Erwin, the Referee heretofore appointed herein, and object to the adoption thereof, on the following grounds, to wit: (Reading from Motion to Set Aside.) [87]

Mr. BROWN.—Excuse me a minute. You have rested your case?

Mr. McGOWAN.—Yes. We have both rested. (Proceeds to read paragraph one.) Now, if the Court please, the remaining paragraphs 3 and 4 are practically the same. We cover the findings separately. They are not sustained by the evidence; they are wrong in fact. That is the effect of the objection at this time, until we arrive at the sixth. (Reads.)

COURT.—Paragraph six you are reading from?

Mr. McGOWAN.—Yes.

. . . Statement by counsel for the defendants as to the disabling of the steamer “Sarah” in

August, 1908, and substitution of steamer "Hannah," followed by argument as to liability of defendants for two licenses.

Mr. McGOWAN.—Now, the next objection, may the Court please, in a general way to the findings, is that the Referee has returned findings to the Court as well as the evidence, and taking the original order of reference in this case (reads Order Appointing Referee), we contend, if the Court please, that the findings as made by the Referee were improperly made, and that the findings should be made by the Court itself upon the testimony returned by the Referee. As to the law of the case, of course I take it that the decision as rendered by the Court under Judge Cushman at that time is still considered by this Court to be the law, and it is therefore unnecessary for me to take up the time of the Court to go into that.

COURT.—Yes.

Mr. McGOWAN.—That being so, we submit case number 612. [88]

Mr. BROWN.—Now, may the Court please, all the matters that Mr. McGowan has mentioned in the way of objections to the Referee's report, with one exception, have been already passed on by Your Honor and Judge Cushman. The liability of these boats to pay the tax, although they were operating between American and foreign ports, and paid a tonnage tax or tonnage fee in Dawson, in the Dominion of Canada, has not been decided to exempt them from the license tax, which is of an entirely different nature. That is under the Act of Congress, provided

for in the Alaska Code. Now, with reference to the steamers "Hannah" and "Sarah," Mr. McGowan claims that the one steamer was substituted for the other, and that the license can be transferred. Your Honor will observe that the law requires the license to be levied upon the steamers that are operating, without regard to how long or for what period they are operated for each year. Now, the "Hannah" may have operated for only one trip, but becomes liable for the tax; the "Sarah" may have operated for only one trip, but still becomes liable for the tax, as this license is not transferable. This license is, one may call it, a personal privilege as applied to each of the steamers. It is not measured by the ability of the company to run several steamers, or how many they can run, but it is levied upon each steamer that does run. That is the measure of the license tax. The law says that a person operating steamers under the conditions named in the statute shall pay a license tax of so much per ton of net tonnage upon each steamer so operated. Now, that means just what it says. It doesn't mean that if one steamer makes a trip this week, and pays a license, and another steamer makes the same trip next week, that the [89] steamer making the trip next week can operate under the license of the steamer making the trip the first week. The law means just what it says: that each steamer operating must pay a license tax.

Now, of course, the order of reference did not require the Referee to make findings of fact and conclusions of law, but he has embraced in his report

what are essentially findings of fact and conclusions of law, and which—although they are not strictly in accordance with the Court, I would suggest that the Court, if he agrees with them, adopt them or consider them as the findings of this Court, and that this Court base its judgment upon them.

There does not seem to be any other questions raised by Mr. McGowan that were not raised upon the original hearing before your Honor and Judge Cushman, and I consider that that is *res judicata* as far as this case is concerned, and for that reason I do not care to argue the matter. The matter is already settled. It is the law of the case, and the case has proceeded upon the assumption that that was the law of the case, and there is no necessity to go over all the argument in favor of the position which your Honor had decided. So that the only questions before the Court in the report of the Referee are, first: whether the tax paid on the “Sarah”—the license which should have been paid on the “Sarah” and which was not paid—should be considered as a joint license fee on account of the “Sarah” and “Hannah”; and whether or not, even if the Referee’s report is informal, in containing more than he was authorized to put in, whether or not your Honor will not, in considering the nature of the case, and rather than strike out the findings of fact and [90] conclusions of law, adopt them as the conclusions of law and findings of fact of the Court.

COURT.—Have the attorneys any authority with reference to the transfer of such licenses?

Mr. McGOWAN.—If your Honor please, I have not.

COURT.—I will allow you to submit authorities on that point. You will have until Tuesday of next week.

Mr. McGOWAN.—612 is submitted. We will now take, if the Court please, 657.

By the COURT.—The motions on the question with reference to striking the Referee's conclusions of law are denied, and accepted to this extent: That the Court after consideration will, independent of the fact that they are the Referee's findings, but probably using them as a guide, accept them as the finding of this Court, so modified as the subsequent ruling on the question of the transfer of the license from the steamer "Sarah" to the steamer "Hannah" may direct.

Mr. McGOWAN.—To which ruling defendant excepts.

COURT.—The exception is allowed. [91]

That thereafter, and in pursuance of its ruling theretofore made, the Court did, on the 5th day of June, 1912, make and enter its judgment; to which the defendant then and there excepted and which exception was allowed by the Court. [92]

That thereafter, and within the time prescribed by law, the defendant in the above-entitled action served and filed its motion for a new trial, which was as follows, to wit: [93]

[Title of Court and Cause.]

Motion for New Trial.

To the Above-named Plaintiff, to James J. Crossley, Esq., United States District Attorney, and to John K. Brown, Esq., Assistant United States District Attorney:

You will please take notice that the above-named defendants now move the above-named Court to set aside its decision and judgment in the above-entitled case and to grant a new trial therein, on the following grounds, to wit:

(1) Insufficiency of the evidence to justify the decision and judgment of the Court in said action, and that said decision and judgment are against law;

(2) Errors in law occurring at the trial of said action and excepted to by the defendants.

This motion will be made upon the pleadings and all proceedings had and taken in this action, on file in the office of the clerk of this Court, and also upon the testimony and the records of the Court, and at the hearing defendants will rely upon the following grounds:

I.

Insufficiency of the evidence to justify the decision of the Court in this that the uncontradicted evidence shows that all of the steamers mentioned in the Referee's report, which said report was adopted by the Court as its findings, were operated by the defendants upon the waters of the Yukon River, within the Territory of Alaska, and within the Yukon Territory, [94] Dominion of Canada, and

that each and all of them were required to, and did, pay a license or tax to the Government of the said Dominion of Canada, and that therefore the said steamers were not liable for a license or tax under the laws of the Territory of Alaska or of the United States of America.

And further, in that the uncontradicted evidence shows that all of the steamers mentioned in the report and findings aforesaid were operated by the defendants elsewhere than in the Territory of Alaska, and were required to, and did, pay a tonnage tax elsewhere than in the Territory of Alaska, namely, in the Yukon Territory of the Dominion of Canada; and in this connection, the defendants hereby rely upon all of the grounds set forth in their motion to set aside the report of the Referee herein.

II.

Errors of law occurring at the trial of said action and duly excepted to by defendants, in that:

(a) The Court erred in finding that the defendants were liable to pay a tonnage tax on the steamers mentioned in the said Referee's report, which was adopted by the Court as its findings, in the following particulars to wit, upon all of the grounds set forth in defendants' motion to set aside said report of said Referee.

(b) The Court erred in holding that the word "elsewhere" as used in section 29, chapter 1, part 3, of the Alaska Codes, meant places in the United States of America and not places beyond the United States of America.

(c) The Court erred in finding that the steam-

boats mentioned in said report and findings were liable to a tonnage tax as found against them, for the reason that said boats were operated on Alaska waters and in the waters of the Yukon Territory [95] of the Dominion of Canada, and were liable to, and did, pay a license tax within the Dominion of Canada.

(d) The Court erred in finding that any or all of the boats set forth in the said findings were liable to pay a license tax to the plaintiff, for the reason that none of said boats, under the Codes of Alaska, were liable to pay any license tax.

(e) The Court erred in finding that the defendants, or either of them, were liable to pay any of the license fees found against them.

(f) The Court erred in finding that the steamer "Hannah" was liable to pay a license fee for the year 1908, as it appears from the evidence that she was put in commission to make one trip for the steamer "Sarah," which was disabled, and that the license of the steamer "Sarah" should have been transferred to the steamer "Hannah."

(g) The Court erred in finding that there was due from the defendant, the Northern Commercial Company, the sum of \$5,090.00, or any other sum, for license fee or tax on the steamers operated by said defendant, as shown by said Referee's report.

(h) The Court erred in finding that there was due from the defendant, the Northern Navigation Company, the sum of \$12,384.00, or any other sum, for such license fee or tax on the steamers operated by it, as shown by said Referee's report.

(i) The Court erred in adjudging and decreeing that the plaintiff recover from the defendant, the Northern Commercial Company, the sum of \$5,090.00, or any other sum.

(j) The Court erred in adjudging and decreeing that the plaintiff recover from the defendant, the Northern Navigation Company, the sum of \$12,-384.00, or any other sum. [96]

(k) The Court erred in adopting the report of the Referee in the above-entitled action.

Dated at Fairbanks, Alaska, this sixth day of June, A. D. one thousand nine hundred twelve.

McGOWAN & CLARK,
Attorneys for Defendants.

Service of copy of within motion acknowledged this 6th day of June, 1912.

JOHN K. BROWN,
Asst. U. S. District Atty.,
Attorney for Plaintiff.

[Indorsed]: No. 612. (Title of Court and Cause.)
Filed in District Court, Territory of Alaska, 4th Div.
June 6th, 1912. C. C. Page, Clerk. By H. C. Green,
Deputy. [97]

After argument on said motion for new trial, the said Court on the 6th day of June, 1912, then and there overruled said motion for new trial, and made and entered its order denying the motion for new trial, which said order was as follows, to wit: [98]

[Title of Court and Cause.]

Order Denying Motion for New Trial.

The defendants' motion for a new trial coming on by consent to be heard on this date, Thos. A. Mc-

Gowan, Esq., of the firm of McGowan & Clark, appearing in favor of said motion, and John K. Brown, Assistant United States Attorney, appearing in opposition thereto, and after hearing and consideration by the Court;

It is ordered that the defendants' motion for a new trial in the above-entitled action be, and the same is, hereby denied.

The defendants then and there excepted to the ruling of the Court and their exception is hereby allowed.

Done at Fairbanks, Alaska, this sixth day of June, A. D. one thousand nine hundred twelve.

PETER D. OVERFIELD,

District Judge.

Entered in Court Journal 12, page 56.

To which defendant then and there excepted, and which exception was allowed by the Court. [99]

And now, in furtherance of justice and that right may be done the petitioners the Northern Commercial Company and the Northern Navigation Company, defendants in the above-entitled action present the foregoing Bill of Exceptions in this cause and pray that the same may be settled and allowed and signed and certified by the Judge of this Court in the manner prescribed by law.

McGOWAN & CLARK,

Attorneys for Defendants. [100]

Stipulation [Concerning Bill of Exceptions].

It is hereby stipulated as follows:

(1) That, within the time allowed by law, as extended by stipulations of counsel and confirmed by

orders of Court, the foregoing bill of exceptions was served upon plaintiff's by defendants' counsel, and the attorneys for plaintiff do hereby admit the due and timely service thereof.

(2) That the foregoing bill of exceptions may be settled and allowed by the Court as the bill of exceptions to be used on the appeal from the judgment made and entered in the above-entitled cause, whether said appeal be prosecuted by writ of error, or by appeal direct, or by both; attorneys for plaintiff hereby expressly agreeing that, inasmuch as counsel for both sides are in doubt as to whether said appeal should be prosecuted by an appeal direct, or by writ of error, or by both, therefore it is stipulated that the foregoing bill of exceptions, when settled and allowed, may be used by the defendants on any appeal that may be prosecuted from the judgment in this action, whether the same shall be prosecuted by appeal direct, or by writ of error, or by both, and that, in the event of a dismissal of either the appeal direct or of the writ of error, thereupon this bill of exceptions shall stand as the bill of exceptions to be used on the hearing in the Court of Appeals in whichever form the same may be heard.

(3) That the foregoing bill of exceptions may be filed on this date in the office of the clerk of the above-entitled court, at Fairbanks, Alaska, and shall thereupon be mailed by the clerk to Hon. Peter D. Overfield, formerly Judge of the above-entitled court, but now Judge of the Third Judicial Division of the Territory of Alaska, at Valdez, Alaska, for his order settling and allowing the same; and that,

pending the return thereof, the defendants' [101] time for having the foregoing bill of exceptions settled and filed shall be extended accordingly; the attorneys for plaintiff hereby agreeing that it shall not be necessary for defendants to procure further stipulations or orders extending the time to settle and file the foregoing bill of exceptions, and hereby expressly consenting that the said time shall be extended until the return of the said bill of exceptions as aforesaid.

Dated at Fairbanks, Alaska, this 19th day of November, 1912.

JAMES J. CROSSLEY,
U. S. District Attorney,
Attorney for Plaintiff.

By JOHN K. BROWN,
Asst. U. S. District Attorney.
McGOWAN & CLARK.

Attorneys for Defendants. [102]

[Title of Court and Cause.]

Order Settling and Allowing Bill of Exceptions.

On this — day of —, 1912, and within due time, the defendants in the action here entitled, by their attorneys, Messrs. McGowan & Clark, duly presented the foregoing bill of exceptions for settlement and allowance, in the manner prescribed by law and the practice of the above-named court; and it appearing to the Court, from the stipulation of counsel, that said bill of exceptions has been heretofore duly served and filed within the time allowed by law, and that the same is true and correct in all respects and contains all the material, testimony, evi-

dence, and exhibits, and other proof whatsoever, introduced by either party during the hearing of said cause; and the Court being fully advised in the premises;

It is ordered that the said bill of exceptions be, and the same is, hereby allowed, settled, approved, and signed as the bill of exceptions for use on appeal in the above-entitled cause, and that the same be made a part of the record in said cause;

It is further ordered that the said bill of exceptions is settled and allowed as the bill of exceptions for use on the hearing of any appeal that may be prosecuted from the judgment in the above-entitled cause, whether the same be prosecuted by writ of error, or by appeal direct, or by both.

Done in open court, at Juneau, Alaska, on this 9th day of December, A. D. 1912.

PETER D. OVERFIELD,

District Judge.

Entered in Court Journal No. 12, page 314. [103]

[Indorsed]: "Original. No. 612. District Court, Territory of Alaska, Fourth Judicial Division. United States of America, Plaintiff, vs. Northern Commercial Company and Northern Navigation Company, Corporations, Defendants. Bill of Exceptions. Filed per stipulation. In the District Court, Territory of Alaska, 4th Div. Nov. 19, 1912. C. C. Page, Clerk. In the District Court for the District of Alaska, Division No. 1. Filed Dec. 9, 1912. E. W. Pettit, Clerk." [104]

[Title of Court and Cause.]

Petition for Writ of Error.

The defendants Northern Commercial Company and Northern Navigation Company in the above-entitled action, feeling themselves aggrieved by the judgment of the Court made and entered in the above-entitled cause by the above-named court on the fifth day of June, A. D. one thousand nine hundred twelve, wherein and whereby the above-named court rendered judgment against said Northern Commercial Company for the sum of five thousand ninety dollars and against said Northern Navigation Company for the sum of twelve thousand three hundred eighty four dollars, and costs against both said defendants.

Now, come Messrs. McGowan & Clark, their attorneys, and petition this Honorable Court for an order allowing these defendants to prosecute a writ of error to the Honorable Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, according to the laws in that behalf made and provided;

And whereas the said defendants desire a stay of execution, pending the hearing of the said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, now, therefore, said defendants petition that an order be made fixing the amount of security which said defendants shall give and furnish on said writ of error, and that, on the giving of such security, all further proceedings in this court may be suspended and stayed until the de-

termination of said writ of [105] error by the said Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

May 19, 1913.

McGOWAN & CLARK,
Attorneys for Defendants.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney, Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Petition for Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [106]

[Title of Court and Cause.]

Petition for Appeal.

Come now the above-named defendants, Northern Commercial Company and Northern Navigation Company, who, conceiving themselves aggrieved by the judgment and decree of this Court made and entered in the above-entitled cause on the fifth day of June, 1912, in the above-named court, do hereby appeal from the said judgment and decree and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herein, and appellants pray that this appeal be allowed and that a transcript of the record, proceedings, and papers on which said judgment and decree was made, together with all pleadings and the exhibits annexed

thereto, all testimony and proofs adduced in the case, all judgments interlocutory or final, opinions of the Court whether interlocutory or final, bill of exceptions, final decree, notice of appeal, and assignment of errors, duly authenticated, may be sent to the United States Circuit Court of Appeals, at San Francisco, California.

Defendants further pray that an order be made, fixing the amount of the security which appellants shall give and furnish on said appeal, and that, on the giving of such security, all further proceedings in this court shall be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals. [107]

And your petitioner will ever pray.

Dated on this 19th day of May, A. D. one thousand nine hundred thirteen.

McGOWAN & CLARK,
Attorneys for Defendants.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Petition for Appeal. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [108]

[Title of Court and Cause.]

Assignment of Errors.

**TO BE SUED ON WRIT OF ERROR AND
DIRECT APPEAL AND BOTH.**

Come now the defendants in the above-entitled cause, being the plaintiffs in error or appellants, and assign the following errors as having been committed by the above-named court on the trial of the above-entitled action, which errors the said defendants intend to, and do, rely upon in their writ of error and appeal and both, to be prosecuted in the United States Circuit Court of Appeals for the Ninth Circuit.

(1) The Court erred in deciding (order of Judges Cushman and Overfield of date 24 August, 1911), "That the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of one dollar per ton per annum for the years 1905 to 1911, both inclusive, on the net tonnage, customs-house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power."

(2) The Court erred in its order of 24 August, 1911, by referring the said action to a Referee for an accounting and in compelling the defendants herein to enter into an accounting before said Referee.

(3) The Court erred in its said order of 24 August, 1911, in determining that the defendants were liable to pay any license tax and in not finding in favor of the defendants and dismissing the said action.

(4) The Court erred in its said order and in its final judgment herein in determining that the defendants were liable, under that part of section 460 of the Code of Criminal Procedure of the District of Alaska set forth in paragraph 2 of the [109] Statement of facts and Stipulation for Submission without Action.

(5) The Court erred in finding that the word "elsewhere," as used in the section of the statute in controversy, meant places in the United States and not places beyond the United States.

(6) The Court erred in finding against the contention of the defendants set out in paragraph 8 of said Statement of Facts and Stipulation for Submission without Action, to wit, the defendant contended that it should not be compelled to pay a license of one dollar per ton per annum on the net tonnage, customs-house measurement, on such of its vessels as were operated conjunctively on the waters of the Yukon River within the Territory of Alaska and the waters of the Yukon River within the Yukon Territory of the Dominion of Canada.

(7) The Court erred in finding against the contention of the defendants set out in paragraph 9 of said Statement of Facts and Stipulation for Submission without Action, to wit, that the defendant should not be required to pay a license of one dollar per ton on any of its river steamboats operated, whether operated wholly on the waters of Alaska or elsewhere.

(8) The Court erred in determining that the section of the Alaska Code set forth in said Statement

of Facts and Stipulation for Submission without Action was not so ambiguous, indefinite and unintelligible as to render the same ineffective and void, and in construing said section against the defendants.

(9) The Court erred in its order of 24 August, 1911, and in its final judgment herein in determining that the section of said Codes last aforesaid was a valid act or law.

(10) The Court erred in its judgment on the report of the Referee of 5 June, 1912, in overruling the defendants' objections to said report and defendants' motion to set aside the same. [110]

(11) The Court erred in its judgment of 5 June, 1912, in ordering, adjudging, and decreeing that the said report of the Referee, including the findings of fact and conclusions of law, be in all respects approved and confirmed.

(12) The Court erred in rendering judgment against the defendants and in approving the report of said Referee in this, that the evidence is contrary to the findings of said Referee and is insufficient to justify the said judgment, in the following particulars, to wit:

(a) That the uncontradicted evidence shows that all the steamboats mentioned in the Referee's report, which said report was adopted by the Court as its findings, were operated by the defendants on the waters of the Yukon River within the Yukon Territory, as well as on the waters of the Yukon River within the Yukon Territory of the Dominion of Canada, and that each and all of said steamers were required to, and did, pay a license or tax to the Gov-

ernment of the Dominion of Canada, and that therefore the said steamboats were not liable for a license or tax under the laws of the Territory of Alaska or of the United States of America.

(b) That the uncontradicted evidence shows that all the steamboats mentioned in the report and findings aforesaid were operated by the defendants elsewhere than in the Territory of Alaska, and were required to, and did, pay a tonnage tax elsewhere than in the Territory of Alaska, to wit, in the Yukon Territory of the Dominion of Canada.

(13) The Court erred in adopting the Referee's report herein in this that the same is contrary to the evidence in the particulars set out in Assignment of Error No. 12.

(14) The Court erred in adopting finding of fact No. 5 of the Referee, to wit: "That the Northern Commercial Company and the Northern Navigation Company are liable to pay to the United States a license tax of one dollar per ton per annum [111] on the net tonnage, customs house measurement, of each of its freight and passenger steamers registered in the Territory of Alaska, operated foreign, i. e., on the Yukon River and its tributaries, both in the Territory of Alaska and the Yukon Territory, Dominion of Canada, for the years 1905 to 1911 inclusive," for the reason that the same is contrary to the evidence and to law.

(15) The Court erred in adopting that part of section 12 of the Referee's finding No. 6, to wit: "And that the said Northern Commercial Company is liable to pay to the United States as license tax on its said

steamers for the years 1905 to 1906, inclusive, the total sum of \$5,090.00," for the reason that the same is contrary to the evidence and to law.

(16) The Court erred in adopting that part of section 30 of the Referee's finding No. 7, to wit: "And that the defendant Northern Navigation Company is liable to pay to the United States as license tax on its said steamers operated foreign, for the years 1907 to 1911, inclusive, the total sum of \$12,-384," for the reason that the same is contrary to the evidence and to law.

(17) The Court erred in adopting the Referee's report and in determining by its judgment of 5 June, 1912, that the defendants are liable to pay a tonnage tax, or other tax, on the steamers referred to in the Referee's report, or on any steamers operated by them, in this that the said finding is contrary to law, for the reason that the defendants should not be required to pay the license or tonnage tax in question on any of the river steamers operated by them, whether operated wholly on the waters of Alaska or elsewhere, under the statute in controversy, owing to the ambiguity and uncertainty of the provisions of said statute. [112]

(18) The Court erred in adopting the finding of the Referee and in determining by its judgment that the steamer "Hannah" was liable to pay a tonnage tax for the year 1908, for the reason that the same is contrary to the evidence, from which it appears that the said steamer was put in commission to make but one trip for her sister ship the steamer "Sarah," which was disabled, and that the license of the

steamer "Sarah" should have been transferred to the steamer "Hannah."

(19) The Court erred in determining by its judgment of 5 June, 1911, that there was due from the defendant Northern Commercial Company the sum of \$5,090.00, or any other sum, for license fees on the steamers operated by it.

(20) The Court erred in determining by its judgment of 5 June, 1911, that there was due from the defendant Northern Navigation Company the sum of \$12,348.00, or any other sum, for license fees on the steamers operated by it.

(21) The Court erred in giving final judgment against the defendants and in refusing to render judgment in favor of the defendants.

(22) The Court erred in overruling and denying the defendants' motion for a new trial, and thereby determining that the evidence was sufficient to justify the judgment and that said judgment was sustained in law.

(23) The Court erred in rendering its said judgment of 5 June, 1911, in favor of the plaintiff and against the defendants, for the reason that said judgment is contrary to the evidence; the evidence is insufficient to justify the same; and that said decision and judgment are contrary to law.

(24) The Court erred in rendering judgment against defendants for their costs.

WHEREFORE: The defendants pray that the judgment in the above-entitled action may be reversed and that they may be allowed all things that

they have lost thereby.

19 May, 1913.

McGOWAN & CLARK,

Attorneys for Defendants. [113]

Due service of the foregoing assignment of errors is hereby admitted this nineteenth day of May, 1913, and it is stipulated that the same may be used on appeal and on writ of error and both.

JAMES J. CROSSLEY,

U. S. Attorney.

Attorney for Plaintiff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Assignment of Errors. Filed in the District Court, Territory of Alaska. 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [114]

[Title of Court and Cause.]

Order Allowing Writ of Error and Fixing Bond.

On motion of Messrs. McGowan & Clark, attorneys for defendants, and the filing of a petition for a writ of error and assignment of errors,—

It is ordered that a writ of error be, and the same is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, the judgment heretofore made and entered herein on the fifth day of June, A. D. one thousand nine hundred twelve, and that the amount of the bond on said writ of error be, and the same is hereby fixed at the sum of twenty thousand dollars, to cover supersedeas, costs, and

damages of defendant in error.

Dated at Fairbanks, Alaska, this 19th day of May,
A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 589.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney.
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Order Allowing Writ of Error and Fixing Bond. Filed in the District Court, Territory of Alaska, 4th Div., May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy.
[115]

[Title of Court and Cause.]

**Order Allowing Appeal and Fixing Amount of
Appeal Bond.**

Now, on this 19th day of May, A. D. one thousand nine hundred thirteen, the same being one of the judicial days of the December, A. D. one thousand nine hundred twelve, special term of the Court, holden at Fairbanks, in the Fourth Judicial Division of the Territory of Alaska, this cause came on to be heard on the defendants' petition for an appeal, and the Court being advised in the premises,

It is ordered that the defendants' appeal in said cause to the United States Circuit Court of Appeals

for the Ninth Circuit, at San Francisco, State of California, be, and the same is, hereby allowed, and that a certified transcript of the record, proceedings, judgments interlocutory and final, decrees, orders, testimony, bill of exceptions, opinions of the Court, notice of appeal, assignment of errors, and all exhibits herein be transferred to the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California.

It is further ordered that the bond for the sum of twenty thousand dollars, this day filed in this cause, conditioned for the payment of all costs, judgments, and damages that may be rendered by the said United States Circuit Court of Appeals for the Ninth Circuit, whether the same be rendered under writ of error or on direct appeal, shall act and take effect as a supersedeas bond on direct appeal, and also as a bond for costs and damages on appeal, and that no other or further bond be [116] required to be given by defendants.

Done in open court at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 588.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney.

Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs.

Northern Commercial Co. et al., Defendants. Order Allowing Appeal and Fixing Amount of Appeal Bond. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [117]

[Title of Court and Cause.]

Order Relative to Supersedeas Bond on Writ of Error.

The defendants above named having, on this day, filed their petition for writ of error from the decision and judgment thereon made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which defendants shall give and furnish on said writ of error, and that, on the giving of said security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals for the Ninth Circuit, and said petition having on this day been duly allowed;

Now, therefore, it is ordered that, on the defendants above named filing with the Clerk of this Court a good and sufficient bond in the sum of twenty thousand dollars, to the effect that, if the said defendants and plaintiffs in error shall prosecute the said writ of error to effect, and answer and pay all judgments, damages, and costs, if they shall fail to make good their said plea, then said obligation to be void, otherwise to remain in full force, effect and virtue, the said

bond to be approved by the Court, all further proceedings in this court shall be, and they are hereby, suspended and stayed until the determination of the said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, [118] at the city of San Francisco, State of California.

Dated at Fairbanks, Alaska, this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 589.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney by Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Order Relative to Supersedeas Bond on Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [119]

[Title of Court and Cause.]

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Northern Commercial Company, a corporation, and Northern Navigation Company, a corporation, appellants herein, as principals, and R. C. Wood and Luther C. Hess, of Fairbanks, Alaska, as sureties, are held and firmly bound unto the United States

of America, appellee herein, in the sum of twenty thousand dollars, to be paid to the said United States of America, appellee, for the payment whereof well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, administrators, successors in interest, and assigns, firmly by these presents.

Sealed with our seals and dated this nineteenth day of May, A. D. one thousand nine hundred thirteen.

Whereas lately, at a District Court for the Territory of Alaska, Fourth Judicial Division, holden at Fairbanks, Alaska, in a suit pending in said court between the United States of America as plaintiff and Northern Commercial Company and Northern Navigation Company as defendants, a judgment was rendered against the defendant Northern Commercial Company for the sum of five thousand ninety dollars, and against the defendant Northern Navigation Company for the sum of twelve thousand three hundred eighty-four dollars, and the said defendants having obtained a writ of error and having been allowed an appeal, and having filed copies thereof in the clerk's office of the said Court, to reverse the judgment in the aforesaid suit, and citations on writ of error and on appeal having been directed to [120] the said United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said Circuit, on the 16th day of June, A. D. one thousand

nine hundred thirteen next;

And whereas the above-named appellants have appealed by writ of error and appeal—being uncertain as to whether the above-entitled action is an action in equity or an action at law,—to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the orders, judgments, and decrees of the above-entitled court in this cause;

And whereas it has been stipulated by counsel for both parties to this action that both sides are in doubt, as to whether such appeal should be prosecuted by an appeal direct or by writ of error, and that these presents shall be considered as a supersedeas bond, either on writ of error or appeal, when the said Circuit Court of Appeals for the Ninth Circuit shall have determined the nature of said action, as more fully appears from the stipulation contained in the bill of exceptions settled in this action;

Now, therefore, the conditions of this obligation are such that, if the above-named Northern Commercial Company and Northern Navigation Company shall prosecute said writ of error or appeal, or either or both, to effect, and shall answer and pay all damages and costs if they shall fail to make good their plea, either on appeal or on writ of error, then this obligation shall be void; otherwise to remain in full force, effect and virtue.

And whereas appellants in error or on appeal desire a stay of execution in the above-entitled action, pending the determination of said appeal or writ of error; [121]

Now, therefore, the further condition of this ob-

ligation is such that, if the said Northern Commercial Company and Northern Navigation Company, appellants, shall prosecute either said writ of error or said appeal to effect and shall answer and pay all damages, costs, and judgments, if they fail to make good their said plea, then the foregoing obligation to be void, otherwise to remain in full force, effect and virtue.

NORTHERN COMMERCIAL COMPANY,

By VOLNEY RICHMOND,

Superintendent and Attorney in Fact.

NORTHERN NAVIGATION COMPANY,

By VOLNEY RICHMOND,

Superintendent and Attorney in Fact.

R. C. WOOD,

LUTHER C. HESS.

Territory of Alaska,
Fourth Division,—ss.

R. C. Wood and Luther C. Hess, being first duly sworn, each for himself and not one for the other doth depose and say that he is a resident of Fairbanks Precinct, Territory of Alaska, and is worth the sum of twenty thousand dollars, to wit, the sum specified as the penalty in the foregoing bond, over and above all his just debts and liabilities, in property not exempt from execution and situate within the Territory of Alaska.

R. C. WOOD.

LUTHER C. HESS.

Subscribed and sworn to before me on this nineteenth day of May, A. D. one thousand nine hundred thirteen.

[Seal]

JOHN A. CLARK,

Notary Public in and for the District of Alaska.

[122]

It is stipulated that the foregoing bond may be accepted and approved as a supersedeas and cost bond, either on appeal or on writ of error in the above-entitled action, that the same is sufficient in form; and that the sureties thereon may be approved by the Court.

Dated at Fairbanks, Alaska, this nineteenth day of May, A. D. one thousand nine hundred thirteen.

JAMES J. CROSSLEY,

United States District Attorney for the Territory of Alaska, Fourth Judicial Division.

Attorney for Plaintiff.

McGOWAN & CLARK,

Attorneys for Defendants.

Pursuant to the foregoing stipulation, the foregoing bond and the sureties thereon are hereby approved and accepted.

Dated at Fairbanks, Alaska, this nineteenth day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER.

District Judge.

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney, Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division.

United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Bond on Appeal and Supersedeas. Filed in the District Court, Territory of Alaska, 4th Div. May 20, 1913. C. C. Page, Clerk. By H. C. Green, Deputy. [123]

[Title of Court and Cause.]

**Designation of Place for Hearing of Writ of Error
and Appeal.**

To the Honorable Frederic E. Fuller, Judge of the
Above-named Court, and to the Plaintiff and Its
Attorney:

Now come the defendants, plaintiffs in error, in the above-entitled action, and pursuant to the provisions of an act of Congress giving the designating of the place of hearing appeals for the Ninth Circuit to the plaintiff in error of the appellant, do hereby designate the City and County of San Francisco, in the State of California, as the place for the hearing of the writ of error and appeal in the above-entitled action.

McGOWAN & CLARK,
Attorneys for Defendants.

Due service hereof admitted this May 24, 1913.

JAMES J. CROSSLEY,
United States District Attorney for the Territory of
Alaska, 4th Div.,

Attorney for Plff.
By JOHN K. BROWN,
Assistant.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United

States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Designation of Place for Hearing of Writ of Error and Appeal. Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [124]

[Title of Court and Cause.]

Writ of Error.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America to
the Honorable Frederic E. Fuller, Judge of the
District Court for the Territory of Alaska,
Fourth Division, Greeting:

Because, in the records and proceedings, as also in the rendition of a judgment dated the fifth day of June, A. D. one thousand nine hundred twelve, of a plea which is in the said District Court for the Territory of Alaska, Fourth Division, before you, between the United States of America as plaintiff, and Northern Commercial Company and Northern Navigation Company as defendants, a manifest error hath happened, to the great prejudice and damage of the said Northern Commercial Company and Northern Navigation Company, as is said and appears by the petition herein,

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if said judgment be therein given, then, under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have the same at the said place in the said Circuit on the sixteenth day of June, A. D. one thousand nine [125] hundred thirteen, that, the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of May, A. D. one thousand nine hundred thirteen.

Attest my hand and the seal of the District Court for the Territory of Alaska, Fourth Division, at the clerk's office, at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

[Seal]

C. C. PAGE,

Clerk of the District Court for the Territory of Alaska, Fourth Division.

Allowed this 19th day of May, A. D. one thousand nine hundred thirteen.

F. E. FULLER,

Judge of the District Court for the Territory of Alaska, Fourth Division. [126]

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,

Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Writ of Error. [127]

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America to the United States of America and to James J. Crossley, United States District Attorney for the Fourth Judicial Division of the Territory of Alaska, Their Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to the writ of error filed in the office of the clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, wherein the United States of America is defendant in error and Northern Commercial Company and Northern Navigation Company are plaintiffs in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, on this 19th day of May, A. D. one thousand nine hundred thirteen, and in the year of our Independence the one hundred thirty-sixth.

[Seal]

F. E. FULLER,
District Judge Presiding in and for the Fourth Judicial Division of the Territory of Alaska.

[128]

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,

U. S. Attorney,
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Citation on Writ of Error. [129]

[Title of Court and Cause.]

Citation on Appeal.

The President of the United States of America to the Above-named Plaintiff and to James J. Crossley, United States District Attorney for the Territory of Alaska, Fourth Division, Its Attorney, Greeting:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, within thirty days from the date

of this writ, pursuant to an order allowing appeal made and entered in the above-entitled cause, in which the United States of America is plaintiff and appellee, and Northern Commercial Company and Northern Navigation Company are defendants and appellants, to show cause, if any there be, why the judgment and decree made and rendered in said action on the fifth day of June, A. D. one thousand nine hundred twelve, as in said order allowing appeal mentioned should not be set aside and reversed and why speedy justice should not be done to said defendants in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, on this 19th day of May, A. D. one thousand nine hundred thirteen, and in the year of our independence, the one hundred thirty-sixth.

Attest my hand and the seal of the above-named District Court, at Fairbanks, Alaska, on this 19th day of May, A. D. one thousand nine hundred thirteen.

[Seal]

F. E. FULLER,
District Judge. [130]

Due service hereof admitted this May 19, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co., et al., Defendants. Citation on Appeal. [131]

[Title of Court and Cause.]

**Order Extending Time Within Which to Perfect
Appeal.**

On this day the above-entitled cause came on to be heard before the Judge in the above-named court, on the application of the defendants herein for an order extending the return days for writ of error and appeal herein, and the parties appearing by their respective attorneys and it appearing to the Court that it is necessary, owing to the great distance from Fairbanks, Alaska, to San Francisco, California, and the slow and uncertain communication between said places, that an order extending the time within which to docket said cause and to file the record therein with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, until and including the first day of August, A. D. one thousand nine hundred thirteen, should be made, the Court, being fully advised in the premises and deeming that good cause exists therefor;

It is hereby ordered that the time within which said appellants shall perfect said cause on appeal and upon writ of error and both, and docket and file the record thereof in said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is, hereby enlarged and extended to and including the first day of August, A. D. one thousand nine hundred thirteen;

It is further ordered that but one record need be transmitted to the said Clerk of the United States Circuit Court of [132] Appeals for the Ninth Cir-

cuit, and that said record shall be used on the hearing of said appeal on direct appeal and on writ of error and both.

Dated at Fairbanks, Alaska, this 24th day of May, A. D. one thousand nine hundred thirteen.

Entered in Court Journal No. 12, page 601.

F. E. FULLER,
District Judge.

O. K.—J. J. C.,

U. S. Atty. [133]

Due service hereof admitted this May 24, 1913.

JAMES J. CROSSLEY,
U. S. Attorney,
Attorney for Plff.

By JOHN K. BROWN,
Assistant.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States of America, Plaintiff, vs. Northern Commercial Co. et al., Defendants. Order Extending Time Within Which to Perfect Appeal. Filed in the District Court, Territory of Alaska, 4th Div. May 24, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [134]

[Title of Court and Cause.]

Stipulation [That Respective Parties may Argue and Submit a Certain Question to Appellate Court for Decision, etc.].

Whereas the matters in controversy in this action were, under instructions from the United States At-

torney General, submitted to the Court under a statement of facts and stipulation for submission without action, which stipulation was entered into between the United States of America and the defendants herein;

And whereas it was intended by said stipulation to secure a construction of that portion of section 460 of the Code of Criminal Procedure of Alaska, which is set out in the original statement of submission as amended at the trial;

And whereas, since the trial of this action, it has been contended by counsel for the plaintiff that the barges, used by the defendants in connection with their operations, should also be liable to a tonnage tax under the provisions of said section;

Now, therefore, for the purpose of having the Appellate Court construe all questions of difference between the United States and the defendants in the present action, so that the rights of the parties may be fully settled herein and that multiplicity of actions be thereby avoided, it is stipulated;

(1) That, when this action is heard in the Appellate Court, the respective parties hereto may argue and submit to the Court, for its decision, the question as to whether barges, which are not propelled by power of any kind and are without steering gear, and which are either towed or pushed by steamboats, are subject to the payment of the tonnage tax provided by the section aforesaid; [135]

(2) That for the purpose of presenting this matter fully to the Appellate Court, both parties hereto may argue and brief this point, and the Ap-

pellate Court may, in its opinion, give its decision thereon, and that, pending said decision, all proceedings, as against the defendants by the United States of America, for the recovery of tonnage taxes on barges, shall be stayed, and that the District Court may enter an order staying proceedings therein;

(3) That for the purpose of presenting this point fully and fairly to the Court, it is stipulated that the said barges are registered in Alaska and are used by the defendants in connection with the river steamers covered by the testimony in this case; that some of said barges are operated on the waters of the Yukon River within the Dominion of Canada as well as on the waters of the Yukon River, within the Territory of Alaska, under the same conditions, as appears from the testimony in this case relating to the river steamers therein referred to; that all barges so operated are not propelled by mechanical power of any kind, but are towed or pushed through the waters by the river steamers operated by the defendants on the Yukon River, as shown by the testimony contained in this record; and that none of said barges have either crews, steering gear, or power of any kind, in or on themselves, but are used merely for carrying freight;

(4) That this stipulation is made for the purpose of avoiding a multiplicity of actions and to secure the decision of the Circuit Court of Appeals on this question, as a construction of the section of the Code in controversy is necessary to determine the liability of the defendants as to whether or not they should pay the license tax in question on barges operated

by them from the year 1905 to and including the year 1911, being the same term of years mentioned in the pleadings [136] in this action, as appears from the records of the Court therein.

Dated at Fairbanks, Alaska, this 2d day of June, 1913.

JAMES J. CROSSLEY,
United States Attorney,
Attorney for Plaintiff.
McGOWAN & CLARK,
Attorneys for Defendants.

[Endorsed]: No. 612. In the United States District Court, Territory of Alaska, Fourth Division. United States, Plaintiff, vs. N. C. Co. & N. N. Co. Stipulation as to Tonnage Tax on Barges. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 3, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy. [137]

**[Certificate of Clerk of U. S. District Court to
Transcript of Record, etc.]**

[Title of Court and Cause.]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify, that the above and foregoing, and hereto annexed one hundred thirty-seven typewritten pages, numbered from 1 to 137, inclusive, constitute a full, true and correct copy, and the whole thereof, including the

indorsements, of the record in cause No. 612, entitled: United States of America, Plaintiff, vs. Northern Commercial Company & Northern Navigation Company, Defendants, wherein the United States of America is Defendant in Error and Appellee and the Northern Commercial Company & Northern Navigation Company are Plaintiffs in Error and Appellants, made in accordance with the praecipe of the Plaintiffs in Error and Appellants, filed herein and made a part hereof; and that the same is by virtue of the writ of error, order of appeal, and citation issued in said cause and is a return thereof in accordance therewith.

And I further certify that this transcript was prepared by me, in my office, and that the costs of preparing same, and certificate, amounting to Fifty-one Dollars and Thirty Cents (\$51.30) was paid to me by counsel for Plaintiff in Error and Appellants. [138]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Fairbanks, Alaska, this fourteenth day of June, 1913.

[Seal]

C. C. PAGE,

Clerk District Court, Territory of Alaska, Fourth Division.

By H. C. Green,
Deputy. [139]

[Endorsed]: No. 2293. United States Circuit Court of Appeals for the Ninth Circuit. Northern Commercial Company and Northern Navigation Company, Plaintiffs in Error and Appellants, vs. United States of America, Defendant in Error and

130 *Northern Commercial Company et al.*

Appellee. Transcript of Record. Upon Writ of Error to and Upon Appeal from the United States District Court of the Territory of Alaska, Fourth Division.

Received July 28, 1913.

F. D. MONCKTON,
Clerk.

Filed July 28, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2293

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN COMMERCIAL COMPANY
and NORTHERN NAVIGATION COM-
PANY,

Plaintiffs in Error and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant in Error and Appellee.

BRIEF OF PLAINTIFFS IN ERROR AND APPELLANTS.

Statement of Facts.

This case comes up on writ of error and appeal upon an agreed statement of facts, which is briefly as follows (Transcript of Record, pp. 4-10, 38-39, 125-128):

The Northern Commercial Company, and the Northern Navigation Company, for some years past, have operated steamboats and barges for the transportation of freight and passengers on the Yukon River in Alaska and also between points in Alaska and Canada.

All of these steamboats and barges are registered in Alaska. Certain of them that ply between Canada and the District of Alaska have been compelled to pay a license tax to the Canadian Government at Dawson, Yukon Territory, Canada.

This suit was brought in 1906 in the District Court for the District of Alaska for the purpose of collecting the license tax, for the years 1905 and 1906, provided for in Section 460, Carter's Code of Criminal Procedure of Alaska (now Section 2569 of the Compiled Laws of Alaska, 1913) upon all of the boats of the appellant company not then paying the tax.

The controversy was submitted to the Court upon the agreed statement of facts in October, 1906, and by an order of Court dated August 24, 1911, it was adjudged that the defendant companies were liable to pay the license tax, and the case was ordered to be heard before a Referee.

Final judgment was given in favor of the plaintiffs on the report of the Referee on June 12, 1912, which judgment included the license taxes held to be payable by the defendants for the years 1905 to 1911, inclusive, amounting to the sum of \$17,474 for the two companies.

The dispute arises upon the construction of the following subdivision of the statute:

“That any person or persons, corporation, or company, prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska, shall first apply

for and obtain a license so to do, from a district court, or a subdivision thereof in said district, and pay for said license, for the respective lines of business and trade as follows, to wit:

Freight and passenger transportation lines, propelled by mechanical power, *registered in the District of Alaska, or not paying license or tax elsewhere*, and river and lake steamers, as well as transportation lines doing business wholly within the District of Alaska, one dollar per ton per annum on net tonnage, custom-house measurement on each vessel. (Italics ours.)

It is admitted that the steamboats now claimed to be subject to the tax under the above statute have the following qualifications of those enumerated in the statute:

- (1) They are propelled by mechanical power;
- (2) Registered in the District of Alaska;
- (3) A few of them are operated wholly within the District of Alaska.

The barges are:

- (1) Used in connection with the transportation of freight by the appellant companies;
- (2) They are not propelled by mechanical power or any power of their own;
- (3) They are registered in the District of Alaska;
- (4) Some operate wholly within the district and some are taken to Canada as in the case of the steamboats.

It is contended on behalf of the appellants that the payment of the license tax to Canada exempts such vessels and barges from the payment of another tax to the United States. It is the contention of the respondents that the payment of such tax in Canada does not so exempt the vessels and barges in question.

Assignment of Errors.

I.

The Court erred in deciding (order of Judges Cushman and Overfield of date August 24, 1911), "That the defendant, the Northern Commercial Company, a corporation, is liable to pay to the United States a license tax of one dollar per ton per annum for the years 1905 to 1911, both inclusive, on the net tonnage, customs-house measurement, of each of its freight and passenger steamships registered in the District of Alaska and propelled by mechanical power."

II.

The Court erred in its order of August 24, 1911, by referring the said action to a Referee for an accounting and in compelling the defendants herein to enter into an accounting before said Referee.

III.

The Court erred in its said order of August 24, 1911, in determining that the defendants were liable

to pay any license tax and in not finding in favor of the defendants and dismissing the said action.

IV.

The Court erred in its said order and in its final judgment herein in determining that the defendants were liable, under that part of section 460 of the Code of Criminal Procedure of the District of Alaska set forth in paragraph 2 of the Statement of Facts and Stipulation for Submission without Action.

V.

The Court erred in finding that the word "elsewhere", as used in the section of the statute in controversy, meant places in the United States and not places beyond the United States.

VI.

The Court erred in finding against the contention of the defendants set out in paragraph 8 of said Statement of Facts and Stipulation for Submission without Action, to wit, the defendant contended that it should not be compelled to pay a license of one dollar per ton per annum on the net tonnage, customhouse measurement, on such of its vessels as were operated conjunctively on the waters of the Yukon River within the Territory of Alaska and the waters of the Yukon River within the Yukon Territory of the Dominion of Canada.

VII.

The Court erred in finding against the contention of the defendants set out in paragraph 9 of said Statement of Facts and Stipulation for Submission without Action, to wit, that the defendant should not be required to pay a license of one dollar per ton on any of its river steamboats operated, whether operated wholly on the waters of Alaska or elsewhere.

VIII.

The Court erred in determining that the section of the Alaska Code set forth in said Statement of Facts and Stipulation for Submission without Action was not so ambiguous, indefinite and unintelligible as to render the same ineffective and void, and in construing said section against the defendants.

IX.

The Court erred in its order of August 24, 1911, and in its final judgment herein in determining that the section of said codes last aforesaid was a valid act or law.

X.

The Court erred in its judgment on the report of the Referee of June 5, 1912, in overruling the defendants' objections to said report and defendants' motion to set aside the same.

XI.

The Court erred in its judgment of June 5, 1912, in ordering, adjudging, and decreeing that the said report of the Referee, including the findings of fact and conclusions of law, be in all respects approved and confirmed.

XII.

The Court erred in rendering judgment against the defendants and in approving the report of said Referee in this, that the evidence is contrary to the findings of said Referee and is insufficient to justify the said judgment, in the following particulars, to wit:

a. That the uncontradicted evidence shows that all the steamboats mentioned in the Referee's report, which said report was adopted by the Court as its findings were operated by the defendants on the waters of the Yukon River within the Yukon Territory, as well as on the waters of the Yukon River within the Yukon Territory of the Dominion of Canada, and that each and all of said steamers were required to, and did, pay a license or tax to the Government of the Dominion of Canada, and that therefore the said steamboats were not liable for a license or tax under the laws of the Territory of Alaska or of the United States of America.

b. That the uncontradicted evidence shows that all the steamboats mentioned in the report and findings aforesaid were operated by the defendants

elsewhere than in the Territory of Alaska, and were required to, and did pay a tonnage tax elsewhere than in the Territory of Alaska, to wit, in the Yukon Territory of the Dominion of Canada.

XIII.

The Court erred in adopting the Referee's report herein in this that the same is contrary to the evidence in the particulars set out in Assignment of Error No. XII.

XIV.

The Court erred in adopting finding of fact No. 5 of the Referee, to wit: "That the Northern Commercial Company and the Northern Navigation Company are liable to pay to the United States a license tax of one dollar per ton per annum on the net tonnage, customhouse measurement, of each of its freight and passenger steamers registered in the Territory of Alaska, operated foreign, i. e., on the Yukon River and its tributaries, both in the Territory of Alaska and the Yukon Territory, Dominion of Canada, for the years 1905 to 1911, inclusive," for the reason that the same is contrary to the evidence and to law.

XV.

The Court erred in adopting that part of Section 12 of the Referee's finding No. 6, to wit: "And that the said Northern Commercial Company is liable to pay to the United States as license tax on its said steamers for the years 1905 to 1906,

inclusive, the total sum of \$5,090.00," for the reason that the same is contrary to the evidence and to law.

XIV.

The Court erred in adopting that part of section 30 of the Referee's finding No. 7, to wit: "And that the defendant Northern Navigation Company is liable to pay to the United States as license tax on its said steamers operated foreign, for the years 1907 to 1911, inclusive, the total sum of \$12,384," for the reason that the same is contrary to the evidence and to law.

XVII.

The Court erred in adopting the Referee's report and in determining by its judgment of June 5, 1912, that the defendants are liable to pay a tonnage tax, or other tax, on the steamers referred to in the Referee's report, or on any steamers operated by them, in this that the said finding is contrary to law, for the reason that the defendants should not be required to pay the license or tonnage tax in question on any of the river steamers operated by them, whether operated wholly on the waters of Alaska or elsewhere, under the statute in controversy, owing to the ambiguity and uncertainty of the provisions of said statute.

XVIII.

The Court erred in adopting the finding of the Referee and in determining by its judgment that

the steamer "Hannah" was liable to pay a tonnage tax for the year 1908, for the reason that the same is contrary to the evidence, for which it appears that the said steamer was put in commission to make but one trip for her sister ship, the steamer "Sarah", which was disabled, and that the license of the steamer "Sarah" should have been transferred to the steamer "Hannah".

XIX.

The Court erred in determining by its judgment of June 5, 1911, that there was due from the defendant Northern Commercial Company the sum of \$5,090.00, or any other sum, for license fees on the steamers operated by it.

XX.

The Court erred in determining by its judgment of June 5, 1911, that there was due from the defendant Northern Navigation Company the sum of \$12,348.00, or any other sum, for license fees on the steamers operated by it.

XXI.

The Court erred in giving final judgment against the defendants and in refusing to render judgment in favor of the defendants.

XXII.

The Court erred in overruling and denying the defendants' motion for a new trial, and thereby

determining that the evidence was sufficient to justify the judgment and that said judgment was sustained in law.

XXIII.

The Court erred in rendering its said judgment of June 5, 1911, in favor of the plaintiff and against the defendants, for the reason that said judgment is contrary to the evidence; the evidence is insufficient to justify the same; and that said decision and judgment are contrary to law.

XXIV.

The Court erred in rendering judgment against defendants for their costs.

Argument.

POINT I.

THIS IS A PENAL STATUTE AND AS SUCH IS TO BE CONSTRUED STRICTLY AND IN FAVOR OF THE TAXPAYER.

The statute under which this controversy arises (Secs. 460, 461, Carter's Code of Criminal Procedure of Alaska) has been held in a recent decision to be penal.

U. S. v. Northwestern Development Co., 203 Fed. 960.

It is a well established principle that penal statutes are to be strictly construed in favor of those

against whom they are to be enforced. Revenue and license tax laws are no exception to this rule.

State v. Wheeler, 44 Pac. 430 (Nev.);

Brown v. Commonwealth, 36 S. E. 485 (Va.);

City of La Crosse v. Gas Co., 130 N. W. 530 (Wis.);

Bluff City Railway Co. v. Clark, 49 So. 177 (Miss.);

Lockwood v. Dis. of Columbia, 24 App. Cas. (D. C.);

U. S. v. Wigglesworth, Fed. Cas. No. 16,690;

Benziger v. U. S., 192 U. S. 38;

Twine Co. v. Worthington, 141 U. S. 468;

Bank of Augusta v. Sandford, 103 Fed. 98;

M'Nally v. Field, 119 Fed. 445;

Lewis' Sutherland on Statutory Constructions, Vol. II, p. 994.

POINT II.

IT WAS THE MANIFEST INTENT OF THE LEGISLATURE THAT VESSELS PAYING TAX ELSEWHERE SHOULD NOT BE LIABLE TO THIS TAX.

It is a rule of construction long established that wherever the words of a statute are not conclusive in their meaning, the intent of the Legislature should be ascertained and followed if possible.

Lewis' Sutherland on Statutory Construction (2nd Ed.), § 363.

In this case, as in all cases, there are two guides to be followed in ascertaining this intent:

First, the wording of the statute (which is discussed later on in this brief under Points IV, V and VI) and

Second, the history and circumstances surrounding the passing of the Act and its subsequent amendments.

Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 656;

Smith v. Townsend, 148 U. S. 490.

“It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. * * *

And by this court in *United States v. Union Pac. R. Co.*, 91 U. S. 72, 79 (23: 224, 228) it was said that ‘courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams*, 46 U. S. 3 How. 24 (11: 475); *Preston v. Browder*, 14 U. S. 1 Wheat. 120 (4: 51).’ And in *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 64 (25: 424, 429) that ‘in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.’”

It is important, first of all, to know just what changes were made by the subsequent amendments to the statutes in order to put it into its present

form. The statute was originally enacted in 1899, and was amended in 1900, only a year after its passage. The amendment was most decidedly a modification of the original Act. In nearly half of the occupations enumerated the tax was reduced.

The subdivision referring to "Freight and Passenger transportation lines" was changed materially. For convenience the two sections are placed side by side:

THE STATUTE AS ORIGINALLY
ENACTED (1899):

Freight and passenger transportation lines, propelled by mechanical power on inland waters

one dollar per ton per annum, etc.

AMENDMENT OF 1900:

Freight and passenger transportation lines, propelled by mechanical power

registered in the District of Alaska, or not paying license or tax elsewhere, and river and like steamers, as well as transportation lines doing business while within the District of Alaska

one dollar per ton per annum, etc.

Where the tax was at first levied on *all* lines "on inland waters", it is now on certain described lines—"those registered in the District of Alaska", or those "not paying license or tax elsewhere",—clearly restricting rather than enlarging the scope of the statute. It would have been easy under the statute as originally passed to have insisted on the tax being paid by all vessels "on inland waters" regardless of the fact that they were already paying a tax elsewhere.

Manifestly, then, the Legislature tried to correct this situation, to avoid the possibility of a double tax. This is apparent when we consider that at the time the amendment was passed all of the trading in Alaska not done on coast-wise and ocean-going vessels (omitted from this discussion for the reason that they are specifically taken care of in a later subdivision of the same Act and Amendment) was necessarily with Canada. The Court must take judicial notice of the fact that the only ports on "inland waters" not within the District of Alaska were those of Canada.

Congress very evidently anticipated the probability of a fleet of steamers flying the British flag, registered at and paying a license tax in Dawson, navigating the Yukon River from White Horse to its mouth. It is possible that Congress did more than anticipate the probability, because, as a matter of fact, there was such a fleet flying the British flag, navigating the Yukon River from Dawson to its mouth. Under these circumstances the imposition of a tax on American vessels doing the same business would burden such vessels with a double tax, possibly to the extent of prohibition.

It is possible also that Congress to encourage navigation, decided that it would not attempt to levy a tax on British vessels going into the Territory, but that it would, as far as possible, put American bottoms on a par. The statute is, moreover, so worded that if at any time the license levied in Yukon Territory should be abolished,

American vessels paying a tax in that Territory would, automatically and without amendment, become at once liable to pay the license tax.

Taking these facts into consideration—and they must have been taken into consideration by the Legislature at the time—to impute an intention to the Legislature other than that contended for by the appellants would be to accuse it of an intentional injustice to American shipping.

POINT III.

THE SPECIFICATION OF VESSELS “NOT PAYING LICENSE OR TAX ELSEWHERE” AS LIABLE TO TAX UNDER THE STATUTES IMPLIEDLY EXEMPTS VESSELS WHICH DO PAY SUCH A TAX ELSEWHERE.

Further on in this brief we will endeavor to make clear that the omission of the Legislature to make such vessels specifically liable to the tax in the opinion of Professor Gayley, whose analysis of the sentence has been made part of the Transcript of Record (Record, pp. 27-33) has the effect from a grammatical standpoint of exempting such vessels from the license tax in Alaska (Point VI *infra*).

Aside from that, however, it is apparent that if the Legislature had intended to tax vessels which paid a tax elsewhere also, it could easily have so provided. It has not done so in the words of the statute. It follows from the application of the well known legal maxim “*Expressio unius est exclusio alterius*” that it has impliedly exempted them.

Brown in his "Legal Maxims" is quoted as saying that no maxim of the law is of more general and uniform application; and it is never more applicable than in the construction of statutes 19 *Cyc.* 23.

In

Feldman v. Morrison, 1 Ill. App. 460, a question arose as to the construction of a statute which prohibited the sale without license of certain liquors which were enumerated.

The Court applied the maxim *expressio unius est exclusio alterius* with the effect that liquors not so enumerated were held to be unaffected by the statute.

For a few of the innumerable cases in which this maxim has been applied see:

Johnson v. S. P. R. R., 117 Fed. 462;

Thomas v. Winne, 122 Fed. 395;

Spier v. Baker, 120 Cal. 370;

People v. Butchers' Assn., 12 Cal. App. 471;

People v. Deutsche etc., 94 N. E. 162 (Ill. 1911);

In re Bailey's Estate, 103 P. 232 (Nev. 1909);

Hughes v. Wallace, 118 S. W. 324 (Ky. 1909).

POINT IV.

THE WORD "ELSEWHERE" IN THE PHRASE "OR NOT PAYING LICENSE OR TAX ELSEWHERE" INCLUDES THE DOMINION OF CANADA.

Neither the subdivision of the original Act in question nor its amendment applies to coast-wise

vessels. The words "on inland waters" in the original Act plainly do not include them. The amendment does not do so in terms. Moreover, the facts would not justify the contention, if it were made by the Government, that the later subdivision in both the original Act and the amendment, which provides for this class of vessels specifically, is applicable to the kind of steamers operated by the appellants.

The subdivision of the Act under which this controversy has arisen as amended can only apply to river steamers, and this because of the geographical situation of the Territory of Alaska, of which the Court must take judicial notice. There are no lakes in Alaska navigable by vessels propelled by steam power. The principal river in the Territory arises "elsewhere" than within the geographical boundaries of such territory, namely, the Yukon, which is navigable between White Horse, in Yukon Territory, and St. Michael, Alaska, opposite the mouth of the river.

The Court should also take judicial notice of the fact that Yukon Territory is a subdivision of the Dominion of Canada and has a seat of colonial government at Dawson. Alaska is bounded by no territory except the Dominion of Canada.

It follows as a matter of necessity that the only place where river steamers would probably be called upon to pay a license tax "elsewhere" was and is at Dawson, in the Dominion of Canada.

There is, moreover, no apparent reason why the word "elsewhere" should not be taken in its literal and natural sense in the sentence quoted.

It is defined as:

"In another place".—*Bouvier's Law Dictionary*.

"In another place; in any other place".—*15 Cyc.* 484.

"In or to another place or places; somewhere or anywhere else".—*Webster's Dictionary*.

The District Court in the case at bar, however, has held that "elsewhere", as used in the above statute, means "elsewhere in the United States". The only justification for inserting the restriction "in the United States" is the doctrine of legal construction known as "*ejusdem generis*". For example: In a statute forbidding the use of obscene language or profanity "in any street, railroad depot, public place or elsewhere" the word "elsewhere" was held to mean a place of the same kind as those just named—that is, a public place.

Peer v. Dixon, 83 A. 180 (N. J.).

It is to be observed, however, that the decisions wherein the Court has seen fit to adopt the "*ejusdem generis*" construction, they have done so not because of the existence of any legal rule, but because the sense of the statute as a whole is in accord with such construction. When there has not been this reason for it, the Court has without hesitation given the natural meaning to the word.

In the case of

Missouri Lead Mining Co. v. Reinhard, 114 Mo. 218; 21 S. W. 488,

it was held that an English corporation given power in its articles of incorporation to acquire mining lands in the State of Missouri “*or elsewhere*” might acquire such lands in England.

Kansas City Southern Railway Co. v. Wallace, 132 P. 908 (Okla. 1913).

In interpreting the phrase “or other person” the Court says:

“It is true that, under the doctrine of ejusdem generis, general words, such as those just referred to, for the purpose of ascertaining the intent of the Legislature, are generally restricted in their scope to the specific class of objects named. But, as is said by the Supreme Court of Missouri in the case of *State v. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179: ‘The rule of ejusdem generis is * * * resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the Legislature intended the general words to go beyond the class specifically designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class or be discarded altogether.’ Other authorities supporting these general propositions and instructive on this phase of the case may be noted as follows: 2 Lewis’ Sutherland, Statutory Construction (2d Ed.), Sec. 436, 437, 438; 36 Cyc. 1119-1122; *United States Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69; *Weiss v. Swift & Co.*, 36 Pa. Super. Ct. 376; *Strange v. Board of Com’rs*,

173 Ind. 340, 91 N. E. 242; State v. Brown et al., 163 Mo. App. 30, 145 S. W. 1180; Mears Mining Co. v. Maryland Casualty Co., 162 Mo. App. 178, 144 S. W. 883; State v. Pabst Brewing Co., 128 La. 770, 55 South. 349.”

POINT V.

PUNCTUATION IS NOT CONTROLLING IN THE CONSTRUCTION OF A STATUTE AND MAY BE DISREGARDED.

The statute is punctuated as follows:

“Freight and passenger transportation lines, propelled by mechanical power registered in the District of Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the District of Alaska, one dollar per ton—etc.”

As pointed out by Professor Gayley in his analysis of the above paragraph, the punctuation serves only to increase the ambiguity rather than clarify the sentence. There are at least three errors in punctuation which must be disposed of in order to get at the real meaning of the Act as it was intended to be by the Legislature. They are:

(1) The comma after the word “lines” and not repeated after the word “power” gives rise to the suggestion that it is the “power” which is registered and not the “lines” (Transcript of Record, p. 28).

(2) The comma after the word “Alaska” and before the word “or” is incorrect, whether the con-

junction "or" is interpreted conjunctively or disjunctively.

(3) The comma after the word "steamers" and none after the word "lines", renders it doubtful whether the phrase "doing business wholly within the District of Alaska" modifies "river and lake steamers" or not.

With these examples before us, it is clear that the punctuation of the statute in question should not be resorted to until all other means fail. Nor are we required by law to do otherwise.

"Punctuation is a minor, and not a controlling element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning."

Railway Company v. Voelker, 129 Fed. 522;

Taylor v. Caribou, 67 Atl. 2 (Me.);

Union Refrigerator Transit Co. v. Lynch, 55 Pac. 639;

Hammock v. Trust Co., 105 U. S. 77; 26 L. Ed. 1111;

Ford v. Land Co., 164 U. S. 662, 41 L. Ed. 590;

Waters-Pierce Oil Co. v. State, 106 S. W. 918 (Tex. 1907);

State v. Brodigan, 125 P. 699 (Nev. 1912);

Duhate v. Adams, 58 So. 475 (Miss. 1912);

Fithian v. St. Louis & S. F. Ry., 188 F. 842 (Ark. 1911);

Lewis' Sutherland on Statutory Construction, Sec. 361.

Applying this principle to the errors pointed out:

(1) The first error is not a matter which is in dispute in this case nor is there any real doubt as to the meaning intended.

(2) The second error is involved in the discussion under Point IV.

(3) As to the third, we can do no better than to quote here Professor Gayley:

“If there had been no comma after “steamers” the nouns italicized, “river and lake *steamers* as well as *transportation lines*” would by punctuation be modified—both of them—by the adjective phrase “doing business * * * Alaska.” As the punctuation stands, the phrase “doing business * * * Alaska” can be interpreted only logically or by implication to modify the “river and lake steamers.” Grammatically it does not. Still less can it be taken to modify more remote subjects preceding the adverb “elsewhere” and the additive conjunction “and.” In fact, as the statute reads, this punctuation makes all “river and lake steamers” whether “doing business wholly in Alaska” or not a subject of the predicate “shall pay one dollar per ton,” etc. And that, I presume, is equivalent to stating that the drafter of the statute unintentionally reduced the law to absurdity.” (Transcript of Record, p. 29.)

It is the contention of the appellants that Professor Gayley is right in his interpretation of this punctuation and unless we read the phrase “river and lake steamers as well as transportation lines doing business wholly within the District of Alaska” without the comma after the word “steamers”

the statute is reduced to an absurdity. Under this construction the two subjects of the verb "shall pay" are:

(1) Freight and passenger transportation lines (doing business partly within and partly without the district), and

(2) Transportation lines including river and lake steamers (doing business wholly within the district).

This emphasizes more clearly still that appellants are not liable under this section. It is admitted that the appellants' steamers are "river steamboats" (Transcript, pp. 5-7), but it is by no means certain that they may be called "freight and passenger transportation lines."

POINT VI.

ANALYZED GRAMMATICALLY, THE STATUTE EXEMPTS VESSELS "PAYING A LICENSE OR TAX ELSEWHERE."

Analyzing the statute grammatically we find that the following two classes of vessels constitute the subject of the sentence:

1. Freight and passenger transportation lines propelled by mechanical power (a) registered in the District of Alaska, or (b) not paying a license or tax elsewhere.

2. Transportation lines including river and lake steamers, doing business wholly within the District of Alaska.

With the single verb "shall pay" understood as the predicate;

And the phrase "\$1.00 per ton per annum on net tonnage, customhouse measurement of each vessel" as the object.

The ambiguity lies in the subject of the sentence as is apparent from the above analysis.

The principle question raised on this appeal arises squarely on the construction of the phrase "or not paying license or tax elsewhere". If that phrase is to be read entirely apart from the phrase immediately preceding it "registered in the District of Alaska", the sentence might be construed as allowing a tax upon vessels registered in Alaska whether paying a tax elsewhere or not. It is submitted that this construction renders the phrase "or not paying license or tax elsewhere" superfluous and unmeaning.

To reduce this to its logical conclusion, the statute could then be read as designating vessels of the following description as liable to the tax:

1. Freight and passenger transportation lines propelled by mechanical power;

(a) registered in the District of Alaska (whether paying a tax elsewhere or not), or

(b) not paying a tax elsewhere (whether registered in the District of Alaska or not).

Under this construction, it would be possible to make ships liable to pay a license tax in Alaska which are

(1) registered in Alaska and paying a license or tax elsewhere; and

(2) not registered in Alaska and not paying a tax elsewhere.

It does not need argument to show that the second of these possibilities at least was never intended by the Legislature. The first is the case at bar and it is claimed that that is more unjust and quite as unintended as the second.

The word "or" in the first clause of the sentence may, according to the opinion of Professor Gayley (Transcript of Record, pp. 31-33), be used in one of three ways:

(a) As a disjunctive;

(b) As co-ordinating the two phrases as equivalent to each other; and

(c) In the sense of "and".

Taking the first of the uses named—"or" as a disjunctive—Professor Gayley is of the opinion that such use makes the two phrases mutually exclusive, and hence, by not inserting that ships paying a license elsewhere could be taxed, the author of the statute has impliedly exempted them by this omission.

"If, *disjunctive* the 'or' implies an alternative (Whitney, p. 148) between the two clauses; that one may be substituted for the other (Century Dictionary, 'Or', I). The 'or' co-ordinates two clauses, 'each one of which in turn is regarded as excluding consideration of the other'. (Century Dict. 'or' Ia). In that case, grammatically, 'freight and

passenger * * * lines * * * Alaska' is one subject of the predicate 'shall pay', etc., and 'freight and passenger * * * lines not paying license or tax elsewhere' is a distinct subject 'excluding consideration of the other' (Century), viz., of those whose 'mechanical power is registered in Alaska'. That is to say, whether the author of this language meant so or not, the second clause excludes entirely the question of registration either of 'lines' or of 'mechanical power' only and states that lines paying license or tax elsewhere, are, by implication, not the subject of the predicate 'shall pay one dollar per ton', etc." (Transcript of Record, fol. 28).

This is an application by an eminent grammarian, and from a grammatical point of view, of the legal doctrine which we have already urged in our interpretation of the intent of the Legislature under Point III of this brief "*expressio unius est exclusio alterius*".

Under the second method of the use of the word "or"—i. e., in a co-ordinate sense—Professor Gayley points out that the two phrases are then to be regarded as equivalent to each other. In other words, they are to be read: "lines registered in Alaska or (as equivalent of the meaning of the former clause) these lines that are not paying license," etc. (Transcript of Record, p. 32).

This again precludes the liability of tax upon ships registered in Alaska and paying a tax elsewhere.

Taking up the third suggestion—that "or" means "and"—it is at once apparent that if the word

“and” were substituted for the word “or” in the clause “registered in the District of Alaska, *or* not paying license or tax elsewhere” all the ambiguity which is now so apparent would be obviated.

The classes of vessels liable to tax under that interpretation would then be:

(1) Freight and passenger transportation lines, propelled by mechanical power registered in the District of Alaska and not paying license or tax elsewhere;

(2) Transportation lines, including river and lake steamers doing business wholly within the District of Alaska.

Such a construction would be unequivocal, equitable, and, it is claimed, expressive of the legislative intent.

That these two words are often substituted one for another as a means of aiding in the construction of a statute is well established by the authorities.

Words & Phrases, Vol. 6, page 5002;
29 *Cyc.*, 1505.

The general proposition is well stated in the following extract from *Lewis' Sutherland on Statutory Construction*, which is frequently quoted by the Courts:

“Sec. 397. USE OF THE WORDS ‘OR’ AND ‘AND’. The popular use of ‘or’ and ‘and’ is so loose and so frequently inaccurate that it has infected statutory enactments. While they

are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context. In *People v. Rice* (138 N. Y. 151, 156, 33 N. E. 846) it is said that the words 'and' and 'or' when used in a statute are convertible as the sense may require. The word 'or' in a statute may have the meaning of 'that is to say', 'to wit', etc."

Cal. Nev. R. R. Co. v. Mecartney, 104 Cal. 616,

the head-note of which reads:

"In Section 3780 of the Political Code, which provides that a redemption may be made within twelve months from the date of the purchase, *or* at any time prior to the filing of certain affidavits and the application for a deed, the word 'or' may be read 'and', as all the recited events are required to happen before the owner will be deprived of his right to redeem."

The following are some of the innumerable cases wherein the Court has interpreted the word "or" as meaning "and":

Swearingen v. U. S., 161 U. S. 448;

U. S. v. Moore, 104 Fed. 78;

Kennedy v. Haskell, 73 Pac. 913 (Kan.);

Williams v. State, 137 S. W. 927 (Ark.);

Clay v. Central R. R. & Bkg. Co., 10 S. E. 967 (Ga.);

Williams v. U. S., 87 Pac. 647 (Okla.);

Harbor Co. v. Leathem, 45 N. E. 422 (Ill.);
Rocky Mt. Oil Co. v. Bank, 67 P. 153 (Colo.);
Thomas v. City of Grand Junction, 56 P.
 665 (Colo.);
Geiger v. Kobilka, 66 P. 423 (Wash.);
Standard Cable Co. v. Atty. Gen., 19 A. 733
 (N. J.);
In re Weed, 67 P. 308 (Mont.);
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James v. U. S. F. & G. Co., 117 S. W. 406
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POINT VII.

THE STATUTE DOES NOT APPLY TO BARGES.

It does not appear in the stipulation submitting this question as to barges owned by the appellant companies, whether or not these barges pay any license tax in Canada. If they do, the same arguments apply as in regard to steamboats.

Assuming even that they pay no tax in Canada, the statute in no sense comprehends barges as to the subject of the license tax. Under any construction there are but three kinds of vessels liable to the tax:

(1) Freight and transportation lines propelled by mechanical power;

(2) River and lake steamers, and

(3) Transportation lines doing business wholly within the District of Alaska.

The barges are admittedly not propelled by mechanical power, but are towed and hence are not of the first class, nor can they be said to be river and lake steamers.

By the stipulated facts (Transcript of Record, p. 127) they do not operate wholly within the district and are therefore not within the description of the third class.

Furthermore, this tax is specified to be "\$1.00 per ton per annum on net tonnage, customhouse measurement of each vessel." A barge is not a vessel and hence is not within the purview of the Act.

U. S. v. Ohio, Fed. Cas. No. 15,915;

U. S. v. Open Boat, Fed. Cas. No. 15, 967.

Conclusion.

It is the contention of the appellants therefore, that the District Court erred in holding that this statute is applicable to the steamboats and barges owned and operated by them.

By the rule of strict construction of penal statutes any doubt in the mind of the Court as to the meaning of the statute must be resolved in favor of the taxpayer and against the government.

“and” were substituted for the word “or” in the clause “registered in the District of Alaska, *or* not paying license or tax elsewhere” all the ambiguity which is now so apparent would be obviated.

The classes of vessels liable to tax under that interpretation would then be:

(1) Freight and passenger transportation lines, propelled by mechanical power registered in the District of Alaska and not paying license or tax elsewhere;

(2) Transportation lines, including river and lake steamers doing business wholly within the District of Alaska.

Such a construction would be unequivocal, equitable, and, it is claimed, expressive of the legislative intent.

That these two words are often substituted one for another as a means of aiding in the construction of a statute is well established by the authorities.

Words & Phrases, Vol. 6, page 5002;
29 *Cyc.*, 1505.

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By the rule of strict construction of penal statutes any doubt in the mind of the Court as to the meaning of the statute must be resolved in favor of the taxpayer and against the government.

In addition to this we contend that it was not the intention of the Legislature in enacting this statute to make it applicable to a case such as is now before the Court,—where the vessels do actually pay a license tax elsewhere and that the word “elsewhere” in this connection includes the Dominion of Canada.

That taken literally and grammatically the statute does not include such vessels.

That it can by no construction include “barges” as a proper subject of the tax.

Finally that to uphold the contention of the government would work an injustice to American ships plying in that district in that it would burden them with the payment of a double tax.

It is therefore respectfully submitted that the judgment of the District Court ought to be reversed.

THOMAS A. MCGOWAN,

JOHN A. CLARK,

LLOYD S. ACKERMAN,

WILLIAM THOMAS,

LOUIS S. BEEDY,

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Attorneys for Appellants.

No. 2293.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN COMMERCIAL COM-
PANY (a Corporation), and NORTH-
ERN NAVIGATION COMPANY (a
Corporation),

Plaintiffs in Error and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant in Error and Appellee.

Upon Writ of Error to, and Appeal from, United States
District Court for the District of Alaska, Fourth Judi-
cial Division.

BRIEF OF DEFENDANT IN ERROR AND
APPELLEE.

PARTS OF APPELLANT'S STATEMENT OF FACTS CON-
TROVERTED.

The statement of facts made by counsel for appel-
lants is hereby controverted in the following par-
ticulars:

First: They state on page 1 of their brief that the
case comes up on writ of error and appeal upon an
agreed statement of facts when in truth it was sub-
mitted to the court below upon the agreed statement
of facts and the evidence taken at the trial before the
court and the hearing before the referee and it comes

up to this court upon the agreed statement of facts and the evidence taken at the trial and hearing.

Pp. 17 to 36 inclusive, and 45 to 66 inclusive,
Transcript of Record.

Second: They state on page 2 of their brief that this statute is with reference to the license tax provided for in Section 460, Carter's Code of Criminal Procedure of Alaska, now Section 2569 of the Compiled Laws of Alaska, 1913, when in truth it is under Section 460 of the Code of Criminal Procedure of the District of Alaska as amended by Section 29 of the Political Code of the said District of Alaska, now Section 2569, Compiled Laws of Alaska, 1913.

Par. II, Agreed Statement of Facts, p. 5, Transcript of Record.

Third: They state on page 2 of their brief that final judgment was given in favor of the plaintiffs on the report of the referee on June 12, 1912, when in truth said judgment was so given on June 5, 1912.

Pp. 13, 16, Transcript of Record.

Fourth: On page 3 of their brief counsel for appellants in referring to the steamboats claimed to be subject to the license tax under this statute as having certain qualifications as those enumerated in the statute, omit to state that such steamboats have not and are not now paying such license or tax elsewhere in Alaska.

Pp. 19, 20, Transcript of Record.

Fifth: They state on page 3 of their brief that the barges are not propelled by mechanical power when in truth such barges are propelled and pushed by mechanical power exerted upon them by appellants' steamers operating the barges.

P. 127, Transcript of Record.

ARGUMENT.

I.

(A) As to Appellants' Assignment of Errors.

(1) Counsel for appellants on pages 4 to 11 inclusive of their brief have set out 24 separate assignment of errors but they do not specifically designate what particular error or errors will be urged; furthermore many of these assignment of errors overlap each other and some of them have been waived by appellants.

(2) Appellants' second assignment of errors is waived by their counsel having moved that a referee be appointed by the court to ascertain the amount of tonnage license tax due in the event appellants were held liable to pay the same and said motion was allowed by the court.

Pp. 18, 19, 38 and 41, Transcript of Record.

(3) Appellants have waived their eighth and ninth assignments of errors by having submitted the controversy under said law and having submitted the question of the interpretation and construction of the statute to the court below without having raised the question of the validity of such statute.

(4) Appellants also waived their seventeenth assignment of error when they submitted the controversy under the existing law to the court below.

(5) That assignment of error No. 22 is not entitled to be considered for the reason that the action of the lower court in overruling and denying appellants' motion for a new trial was a matter entirely within the judicial discretion of the lower court and will not be disturbed.

(B) Object of the Statute, Its Validity and Construction.

Congress may provide by direct legislation for a system of licenses for the support of local government in the territories, and the act in question is one for the support of local government, said act, approved June 6, 1900, having superseded a former act of Congress enacted for the same purpose, approved March 3, 1899.

In re Wynn-Johnson, 1 Alaska 630;

United States vs. Binns, 1 Alaska 553;

Binns vs. United States, 194 U. S. 486, 48 L. Ed. 1087;

Engleman vs. United States, 86 Fed. 456;

John J. Sesnon Co. vs. United States, 182 Fed. 576;

25 Cyc. 599.

The constitutional inhibition against the laying of tonnage duties by the States does not apply, even though Congress has the right to so legislate for the territories. The tax in question is not one for the

privilege of the arrival and departure of the vessels of appellants to and from the ports of Alaska: it is a license for the privilege of all persons engaged in the same business and the power to require the payment thereof should not be denied, even to the States under the facts appearing in this record.

Giozze vs. Tiernan, 148 U. S. 657, 37 L. Ed. 599;

Armour Packing Co. vs. Lacy, 200 U. S. 226, 50 L. Ed. 451.

The tax in question is not a tonnage tax or duty but a license fee based on tonnage capacity, the phrases "duty of tonnage" and "tonnage tax or duty" meaning a charge, tax, or duty, on a vessel for the privilege of entering or leaving a port. The authority of the State to assess canal tollage rates on a tonnage basis is upheld even though the vessels were engaged in interstate commerce.

Transportation Co. vs. Parkersburg, 107 U. S. 691, 27 L. Ed. 584;

Hughes vs. Glover, 119 U. S. 534, 30 L. Ed. 487.

The court doubtless will at an early stage of this hearing be impressed with the anomalous position of the appellants. Here are two corporations whose chief activities are confined to the exploitation of Alaska in mercantile and transportation lines of business. Ever since the year 1905 they have been receiving without cost the benefits for which they should have been paying under this statute. Just why this

cause should have been submitted to the civil courts instead of the criminal branch where it belongs is not for me to question, before your Honors, but I do maintain that appellants come before this court with very poor grace and contest the validity of the statute which makes them criminals unless they shall comply with the terms thereof in advance. There is good law and sound reasoning behind the proposition that the appellants at bar, having been beneficiaries all these years under the very statute in issue and having agreed to submit this statute to the court for its construction, will not at this time be heard to question its validity.

Grand Rapids etc. Railway Co. vs. Osborne,
193 U. S. 17, 48 L. Ed. 598;
McKinney vs. Carroll, 12 Pet. 66, 9 L. Ed.
1002;
Electrical Co. vs. Dow, 166 U. S. 489, 41 L.
Ed. 1088;
Daniels vs. Tearney, 102 U. S. 415, 26 L. Ed.
187.

In the case at bar, which is a test case upon the outcome of which other cases are awaiting to be disposed of, the government is asking for the payment of the license taxes due from the appellants for the years 1905 to 1911 inclusive, and while, by having the controversy submitted to the court upon an agreed statement of facts and evidence produced at the trial and referee's hearing, appellants have avoided criminal prosecutions and had the use all these years of that money belonging to the government, they now come

into this court and for the first time, as appears under Point I on pages 11 and 12 of their brief, urge upon this court that this is forsooth a penal statute and as such is to be construed strictly and in favor of the tax payer, the appellants, and quote several authorities endeavoring to support their contention, but counsel for appellants quote no authorities where the controversy was brought into court as in this case, upon the motion and agreement of appellants themselves. Appellants are not now being prosecuted for a criminal offense and cannot in this action insist that it be construed strictly and even though they were being prosecuted for a criminal offense, the statute being a revenue statute should be construed liberally and sensibly so as to carry out the purposes of the legislative intention in its enactment, which in this case was to raise revenue, and also so as to avoid an unjust or absurd conclusion.

John J. Sesnon Co. vs. U. S., 182 Fed. 576;

Lau Ow Bew vs. United States, 144 U. S. 59,
36 L. Ed. 344.

Replying to the propositions set up by appellants in their argument under Point II, pages 12, 13, 14, 15 and 16 of their brief, we insist that the lower court was right in its construction of the wording of the statute itself and holding the vessels of the appellants to come within the plain scope thereof and this contention is made the more logical from a comparison of Section 460 as originally enacted (pages 121 and 122, Carter's Code of Alaska), and the section as

amended by the Act of June 6, 1900 (Sec. 29, pages 140 and 141, Carter's Code of Alaska, and Sec. 2569, Compiled Laws of Alaska, 1913). The original reading of said Section 460 as applying to license on vessels was as follows:

"Freight and passenger transportation lines propelled by mechanical power on inland waters, one dollar (\$1.00) per ton per annum on net tonnage custom house measurement of each vessel. * * * Ships and Shipping: Ocean and Coastwise vessels doing local business for hire plying in Alaskan waters one dollar (\$1.00) per ton per annum on net tonnage custom house measurement of each vessel."

The section as amended referring to the same subject matter is as follows:

*"Freight and passenger transportation lines, propelled by mechanical power registered in the District of Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the District of Alaska, one dollar (\$1.00) per ton per annum on net tonnage custom house measurement on each vessel. * * * Ships and Shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, registered in Alaska or not paying license or tax elsewhere, one dollar (\$1.00) per ton per annum on net tonnage, custom house measurement of each vessel."*

The italicized matter in the last quotation is the substance of the amendment.

(a) Why was not the phrase "or not paying license or tax elsewhere" carried into the original act of March 3, 1899? We answer: Because at that time Alaska as a whole constituted one judicial division

under the act of May 17, 1884 (23 Statute at Large, page 24), and said act of March 3, 1899.

(b) And why was said phrase inserted in the act of June 6, 1900? We answer: Because under Section 4 of that act there were created three judicial divisions in Alaska where there had formerly been but one and under Section 7 thereof, without the "elsewhere" restriction the clerk of the court in each division where such vessels operated would be authorized to collect said one dollar (\$1.00) per ton license which would have been a flagrant example of double taxation for the same purpose in the same jurisdiction.

(c) What was the purpose of the remaining amendatory matter? We answer: Very obviously a reclassification. Under the original act there were but two classes with the following qualifications, to-wit:

I. Freight and passenger transportation lines (1) propelled by mechanical power and (2) plying on inland waters.

II. Ocean and coastwise vessels doing local business for hire plying in Alaskan waters.

Under the amended act there are three classes in lieu of class I above mentioned with the following qualifications:

Class I. Freight and passenger transportation lines propelled by mechanical power (1) registered in the District of Alaska (2) or not paying license or tax elsewhere (in Alaska).

Class II. River and lake steamers.

Class III. Transportation lines doing business wholly within the District of Alaska.

The amendment therefore obviates two legal objections, *first*, double taxation which might have resulted without it, and *second*, lack of uniformity which would have resulted but for class III above enumerated. It is too patent for argument that if Congress in making this amendment had in mind a distinction between vessels operating in interstate and foreign commerce and those operating wholly in Alaska, such distinction could and would have been made in a clear, unambiguous and separate class or proviso; in fact we submit that the addition of class III above mentioned is equivalent to an expressed declaration that vessels registered in Alaska are subject to the payment of the license tax without regard to where they operate outside the waters of Alaska.

(C) *What is Meant by the Word "Elsewhere" in this Statute?*

Replying to Points III, IV, V and VI of appellants' argument in their brief, we submit to the court the following propositions:

The clause in this statute "or not paying license or tax elsewhere" means elsewhere within the jurisdiction and Canada is not within such jurisdiction, for it is an entirely foreign country.

Judy vs. Beckwith, 15 L. R. A. (N. S.) 142;
Sturges vs. Carter, 114 U. S. 511, 29 L. Ed.
 240;
American Steel and Wire Co. vs. Speed, 192
 U. S. 500, 48 L. Ed. 538;
 Vol. I, Bouvier's Law Dictionary, p. 654;

Vol. III, Words and Phrases, p. 2348;
Brown vs. Jones et al., 4 Fed. Cases 2017, p.
 404;
 15 Cyc. 481 and notes;
Lau Ow Bew vs. United States, 144 U. S. 47,
 36 L. Ed. 345;
United States vs. Billings, 190 Fed. 359 to 368.

The tonnage license tax on freight and passenger transportation lines propelled by mechanical power registered in the District of Alaska or not paying license or tax "elsewhere" must be paid in the Judicial District of Alaska where operated—if not paid elsewhere in the territory of Alaska—even though a similar tonnage license tax has been paid in some foreign country.

Coe vs. Errol, 116 U. S. 517, 29 L. Ed. 717;
Grigsby Construction Co. vs. Freeman, 108
 La. 435, 58 L. R. A. 349;
Nelson Lumber Co. vs. Loraine, 22 Fed. 54;
Southern Pacific Co. vs. Kentucky, 222 U. S.
 63, 56 L. Ed. 96;
Ayer & L. Tie Co. vs. Kentucky, 202 U. S.
 409, 50 L. Ed. 1082.

The tax is not double.

Davidson vs. New Orleans, 96 U. S. 97, 24 L.
 Ed. 616;
Tennessee vs. Wentworth, 117 U. S. 129, 29
 L. Ed. 830;
*Savings and Loan Society vs. Multnomah
 County, Ore.*, 160 U. S. 421, 42 L. Ed. 803.

As to the construction of the word "elsewhere" employed in Section 460 of the Alaska statute as men-

tioned in issue here (Sec. 2569, Compiled Laws Alaska, 1913), we contend that the lower court was right in adopting the rule of *ejusdem generis* and saying, in effect, it means "a like license elsewhere within the jurisdiction" (of Alaska). Any other construction would render the section meaningless both as to the scope and purpose of the act and the modifying context. We think the refined grammatical technique of Professor Gayley (should this court be inclined to consider the same) must give way to the well settled rules of legal construction. The doctrine of *ejusdem generis* is especially applicable to statutes defining crimes and regulating their punishment. By this rule where general words following the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

36 Cyc. 1119, Division II and note 36;
Rohlf vs. Kasmeirer, 118 N. W. 276, 23 L. R.
 A. (N. S.) 1286;
Lane vs. State, 39 Ohio State 312;
Ex parte Muckenfuss, 107 S. W. 1131;
State vs. Goodrich, 54 N. W. 577.
 P. 34, Transcript of Record, No. 2293 in this
 Court.

An ordinance made it a crime to "aid, maintain or
 "assist in any improper noise, riot or disturbance or
 "breach of the peace in streets or highways or else-
 "where in the city" and the Court said the word "else-
 where" should be construed in connection with the

words "streets or highways" and must be regarded as signifying places *ejusdem generis*.

State vs. Camden (N. J.), 19 Atl. 539.

So under Minnesota Criminal Code, Sec. 240, Subdivision 2, it was made a crime for any person to entice an unmarried female "into a house of ill fame or of assignation or elsewhere" for purposes of prostitution. The court held the word "elsewhere" to be *ejusdem generis* and referring only to places similar in character to houses of ill fame or of assignation.

State vs. McCrum, 36 N. W. 102.

These steamboats and barges are all registered at St. Michael, or Eagle, in Alaska. They have their real *situs* in Alaska for they ply on the rivers in Alaska. They have the protection of the laws of Alaska and Congress can regulate commerce not only between the states but also with foreign states and it certainly has the power and authority to impose a license tax as it has done in this case upon appellants' freight and passenger transportation lines propelled by mechanical power.

As to the *situs* for the purposes of taxation it is not claimed in this case that the steamboats in question have a home port outside of Alaska. The boats are registered either at St. Michael or Eagle and the greater part of their business is done within Alaska.

Johnson vs. Merchants Line, 37 L. R. A. 518
and annotations;

Pp. 33, 34, Transcript of Record.

Furthermore there is no claim that said vessels are engaged in interstate commerce or that the corporations owning them have their *situs* in any state or foreign country to which their operation attaches. Therefore the *situs* of said property for the purpose of the license claimed under this statute is Alaska.

36 Cyc. 17;

The Jennie B. Gilkey, 19 Fed. 127;

Morgan vs. Parham, 83 U. S. (16 Wall.) 471,
21 L. Ed. 303;

Hays vs. Pacific Mail S. S. Co., 58 U. S.
(How.) 597, 15 L. Ed. 254.

Even if the vessels in question were entered in Alaska from a foreign country and their home port was Dawson, Yukon territory, Canada, the contention of appellants would not be sustained because the treaty of 1815, putting British vessels coming into our ports on the same footing as to duties and charges as American vessels, extends only to vessels coming from European ports, and not to vessels coming from the West Indies or the British possessions in North America.

United States vs. Hathaway (3 Mason 324),
Fed. Case No. 15326;

The Alta, 148 Fed. 663.

The taxing power of the State is never presumed to be relinquished and it exists unless the intention to relinquish it is declared in clear and unambiguous terms admitting of no other reasonable construction. An exemption from taxation must be clearly defined.

and founded upon plain language without doubt or ambiguity. Also exemption from taxation is not favored by law and will not be sustained unless such clearly appears to have been the intent of the legislature and every reasonable doubt should be resolved in favor of the taxing power.

Southwestern Ry. Co. vs. Wright, 116 U. S. 231, 29 L. Ed. 626;

Bank of Commerce vs. Tennessee, 161 U. S. 134, 40 L. Ed. 645;

Yazoo and Mississippi Valley R. R. Co. vs. Adams, 130 U. S. 1, 45 L. Ed. 395;

Chicago, Burlington and Kansas R. R. vs. Missouri, 120 U. S. 569, 30 L. Ed. 732;

Memphis Gas Light Co. vs. Taxing District, 109 U. S. 398, 27 L. Ed. 976.

Exemptions from taxation are regarded as in derogation of the sovereign authority and of the common right and therefore not to be extended beyond the exact and express requirements of the language used construed *strictissima generis*.

Yazoo and Mississippi Valley Ry. Co. vs. Thomas, 132 U. S. 174, 33 L. Ed. 302.

The specific terms of the section in controversy are "Freight and passenger transportation lines propelled by mechanical power registered in the District of Alaska," qualified by the general term "or not paying license or tax elsewhere," bearing in mind the organization of the tax collecting power of Alaska under the act of June 6, 1900, there being three judi-

cial divisions, the clerk of court in any one of which might demand the licenses in controversy. It seems to us that the meaning of said section is so plain as to make unnecessary any further argument or reference.

II.

IS THIS CASE PROPERLY BEFORE THIS COURT?

Counsel for the government contend that, although there was a stipulation to submit to the District Court of Alaska the question of the liability of the appellants to pay this license tax, that stipulation made no provision for an appeal or writ of error to this or any other court—in fact the whole tenor of the stipulation indicates that appellants would abide the decision of the lower court in which tribunal or a judge thereof was vested the power to grant licenses—the proceeding was not a suit or action in which a final decree or judgment was rendered, from which the appellants could take an appeal or writ of error to this Court or the Supreme Court. This proceeding was in effect an application for a license, coupled with a protest against being required to take out such a license and pay for the same, on the ground that it did not come within the provisions of the Alaska law and its collection was therefore illegal. Furthermore, in the case at bar we have a revenue statute imposing license taxes for the support of local government in the territory of Alaska but the appellants have not paid any money in liquidation of such license taxes. The statute of limitations, too, has been enlarged by the stipulation

to submit the controversy to the lower court and the jurisdiction of the lower court under the stipulated case would not be affected as judgment in the lower court should be considered final. Therefore the order and judgment of the District Court should be confirmed.

Pacific Steam Whaling Co. vs. U. S., 187 U. S. 452, 47 L. Ed. 253 to 256 inclusive;
Corbus vs. Alaska Treadwell Co., 99 Fed. 334;
Taylor vs. Secor, 92 U. S. 613, 23 L. Ed. 673;
Patton vs. Brady, 184 U. S. 614, 46 L. Ed. 717;
 Pp. 4 to 10, inclusive, and 33, 34, 38 and 39,
 Transcript of Record.

III.

DOES THIS STATUTE APPLY TO BARGES?

The barges of the appellants are registered in Alaska, have their *situs* in Alaska, are used on the rivers of Alaska, have the protection of the laws, are propelled by mechanical power by steamers pushing such barges and they are not taxed in any other way nor are they exempted from taxation, for the arguments and authorities against exempting barges from taxation are just as strong as regards the steamboats hereinbefore referred to.

There are some ten propositions concerning these barges to be carefully considered.

(1) While the barges are not propelled by their own mechanical power they are propelled by the mechanical power of the steamboats pushing them and the statute does not say that they must be propelled by

low for the amount named; also that said ruling as to liability to the license tax is applicable to appellants' barges.

This is not a criminal case being prosecuted against appellants and even though it were, the general rule of strict construction of penal statutes does not apply and particularly such rule does not apply in favor of appellants in the case of a revenue statute as this is.

The Congress of the United States exercising plenary powers over the territory of Alaska and endeavoring to raise revenue for the purpose of paying the expenses of local government in Alaska provided by the United States itself, certainly did intend that appellants should pay a license tax upon their vessels and barges registered in Alaska or not paying license or tax elsewhere in Alaska, not elsewhere in Canada entirely outside the jurisdiction even of Congress itself.

The statute should be construed liberally and so as to give it the effect for which it was enacted, for revenue purposes, and according to the well settled rules of legal construction, and by such construction both the steamboats and barges of appellants should be included as proper subjects liable to this license tax since they together constitute appellants' freight and transportation line propelled by mechanical power registered in Alaska.

The upholding by this court of the government's contention as sustained by the District Court would work no injustice whatever to American ships plying in the District of Alaska, but would rather place all on an equitable basis for the reason that those

ships touching at Canadian ports on the Yukon River gain a considerable advantage thereby over those ships confining themselves to Alaskan waters and for that advantage the Canadian government requires the payment of a small sum each year amounting to about one-sixth of what they are required to pay under this statute in Alaska and they should not be allowed to, nor did Congress intend that they should, thus evade this license tax in Alaska. All the authorities, too, hold that such taxes are not double. Canadian ships touching at Alaskan ports also have certain duties or tonnage to pay in addition to the license or tax they pay in Canada. In Alaska, too, Congress has imposed no personal property valuation tax upon appellants' steamboats and barges other than this license tax upon appellants' line of business in prosecuting a freight and transportation line propelled by mechanical power, consisting of its steamboats and barges.

Upon the foregoing arguments and authorities, the government's contention is that the decision and judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

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